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NO. _____

IN THE

Supreme Court of the United States

October Term, 1983

CITY OF DEARBORN, a Michigan Municipal Corporation, et. al., *Petitioner*,

v.

KATHERINE AMEN, et. al., *Respondent*.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARRY L. HOWARD
19675 W. Ten Mile Road
Southfield, Michigan 48075
(313) 355-4900
Counsel for Petitioner

FRANK A. GUIDO
19675 W. Ten Mile Road
Southfield, Michigan 48075
(313) 355-4900
Of Counsel

WILLIAM C. HULTGREN
13615 Michigan Avenue
Dearborn, Michigan 48126
(313) 943-2035
Of Counsel

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTION PRESENTED FOR REVIEW

WHETHER A TAKING OF PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION EXISTS WHERE THE COMBINED ADMINISTRATIVE ACTIONS OF A CITY IN THE CONDUCT OF AN URBAN RENEWAL PROGRAM RESULT IN DEVALUATION OF PROPERTY; ABSENT DESIGNATION OF SPECIFIC PROPERTY FOR CONDEMNATION; AND, ABSENT PHYSICAL OUSTER OF THE OWNER, OR PHYSICAL INVASION OF THE PROPERTY, OR LEGAL INTERFERENCE WITH THE OWNER'S TITLE, POSSESSION OR POWER OF DISPOSITION OF THE PROPERTY?

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ON WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, City of Dearborn, respectfully prays that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 6, 1983.

OPINION BELOW

The Opinion of the Court of Appeals is reported in *Amen* v. *City of Dearborn*, 718 F.2d 789 (6th Cir. 1983) and

appears in the Appendix hereto.[1] Previous Court of Appeals and District Court for the Eastern District of Michigan Opinions in the same matter are reported at 532 F.2d 554 (6th Cir. 1976) and 363 F. Supp. 1267 (E.D. Mich. 1973), respectively and are contained in the Appendix. Various other Opinions and Orders of the Court of Appeals and District Court are unreported and are found in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was decided and entered on October 6, 1983. This Petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT V

No person, shall be held to answer to a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in

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[1] Plaintiffs include Katherine Amen, Charles Costa, Helen Berri, Joseph Chaidez, Alan Amen, Evelyn Tilley, Fatima Kadoura, Carl Doak, Barney Skolmowski, Leo Kendziorek, Joi Akers, Southeast Dearborn Community Council, Inc., and Eugene-Porath Community Association. Only the City of Dearborn remains a Party Defendant in this proceeding, all other originally named Party Defendants having been dismissed by either the trial court or the Appellate Court for failure to effectuate proper service.

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a class action suit seeking injunctive relief as well as damages, alleging that the City of Dearborn has taken property without just compensation of residents in the South End and Eugene-Porath neighborhoods in the southeast section of the City of Dearborn, Michigan. The taking of property is alleged to be in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. Jurisdiction of the District Court for the Eastern District of Michigan was premised on the federal question jurcsdictional statute, 28 U.S.C. § 1331, and the civil rights jurisdictional statute 28 U.S.C. § 1343(3).

The District Court held that the City, intended to clear the Eugene-Porath and South End areas by purchase, and thereafter demolish all structures, and to rezone the

area for industrial and business use. The District Court concluded that the combined administrative actions of the City resulted in a devaluation of property and, in essence, a "forced sale" of property, thereby constituting a taking in violation of the Fifth and Fourteenth Amendments. The disputed administrative actions of the City in the conduct of its urban renewal program were found by the District Court to have included: the denial and delay in the issuance of building and repair permits; isolated statement by a City official that the purchase price paid by the City for property would be going down; the required installation of mechanical garbage disposals; public meetings and press releases, generally indicating clearance projects for the South End and Eugene-Porath areas; posting of signs soliciting purchase; and allowing purchased property to remain vacant.

The District Court found that none of the administrative actions of the City standing alone, constituted a taking of property, however, the combination of administrative actions resulted in a taking for which just compensation was due. That conclusion was made despite the isolated nature of the administrative actions in conduct of the urban renewal program which devalued property and, despite the absence of administrative action designating specific property for condemnation.

The most dominant feature of the South End and Eugene-Porath area of the city is that it is engulfed by heavy industry. Specifically, the Ford Motor Company Rouge Plant is located on an enormous 1,100 acres of land south of the Eugene-Porath area and to the west of the South End. The plant was constructed in 1918 and exists to this date. Additional industry is located north of the South End, being the Clippert Brick Company,

established in 1912, and the Mercier Company, established in 1924. The South End is surrounded on three geographic sides by heavy industry. As such, the areas are plagued by smoke, dust and industrial traffic. Prior to 1924, 237 of the homes in the area were built. Between 1924 and 1940, 216 homes were constructed and between 1941 and 1960 only 10 new homes were built. Between 1961 and 1971, there was no new housing constructed in the area.

The City determined that the Eugene-Porath area and certain portions of the South End should not remain residential. The City adopted a Master Plan calling for urban renewal clearance and conservation of the affected areas. It was the City's policy to effectuate the public purpose of the long range urban renewal programs through acquisition of property by negotiation and purchase rather than designation of specific property for condemnation.

On appeal, the Sixth Circuit reversed on jurisdictional grounds, without reaching the substantive merits of the dispute. The District Court, on remand, determined that jurisdiction existed under 28 U.S.C. § 1331 and, thereafter, reinstated its former judgment. On appeal, the Sixth Circuit affirmed in part and reversed in part the District Court judgment; affirming as to the finding that the administrative actions of the City devalued property, thereby "forcing the sale" of property in violation of the taking clause of the Fifth and Fourteenth Amendments.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A TAKING OF PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION DOES NOT EXIST WHERE THE COMBINED ADMINISTRATIVE ACTIONS OF THE CITY IN THE CONDUCT OF AN URBAN RENEWAL PROGRAM RESULT IN DEVALUATION OF PROPERTY; ABSENT DESIGNATION OF SPECIFIC PROPERTY FOR CONDEMNATION; AND, ABSENT PHYSICAL OUSTER OF THE OWNER, OR PHYSICAL INVASION OF THE PROPERTY, OR LEGAL INTERFERENCE WITH THE OWNER'S TITLE, POSSESSION OR POWER OF DISPOSITION OF THE PROPERTY.

The Court of Appeals for the Sixth Circuit affirmed the District Court conclusion that a devaluation in property occurred by the administrative actions of the City in conduct of its urban renewal program, thereby, resulting in forced sale of property. The Court held, therefore, that the administrative actions deprived owners of "all or most" of their interest in property, hence, a taking existed. That conclusion was made absent proof that the City's combined administrative actions were directed at specific property or that specific property was designated for condemnation. No proof, moreover, existed that the City physically invaded or ousted owners of property.

The Court of Appeals' decision conflicts with legal principles espoused by the Supreme Court and decisions of other Courts of Appeals. The holding also conflicts with previous decisions of differently composed panels of the Sixth Circuit.

A. Conflict With Supreme Court Decisions

The Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977) declared:

> this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transportation Co., 438 U.S. at 124. Despite the inability to establish a "set formula," the Court identified several factors to be considered in the "essentially ad hoc" factual inquiry, stating:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. (Cite omitted). So, too, is the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, (cite omitted), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. .

Penn Central Transportation Co., 438 U.S. at 124. In *Danforth* v. *United States*, 308 U.S. 271 (1939), the court established:

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. It cannot be considered as a "taking" in the constitutional sense.

Danforth, 308 U.S. at 285. Likewise, in *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979), the Court stated that ". . . a reduction in the value of property is not necessarily equated with a taking." Damage alone does not require compensation where there is not an actual taking of property. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 510 (1945).

In *United States* v. *Cress*, 243 U.S. 316 (1916), a taking was found where the federal government, by means of a lock and dam, raised the water level such that lands not normally invaded by overflowing, were subjected to permanent, periodic overflows injuring the value of the property. The Court stated:

> . . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question as to whether it is a taking.

Cress, 243 U.S. at 328. The Court, therefore, established a two-fold requirement that an invasion of property occur as well as damage being substantial. *See also: United States* v. *Causby*, 328 U.S. 256, 266 (1945). The logical extension of the legal principles established within the aforesaid decisions is that a determination whether a taking exists is premised upon the "character" of governmental action towards *specific property*, and not the character of government action generally toward property within a neighborhood in an urban renewal project area.

The Court of Appeals in the present matter declared that the Petitioner committed a constructive taking of property since the effect of its administrative action, short of acquisition of title, was so complete as to

deprive the owner of all or most of his interest in the property. In support of its conclusion, the Court cited *United States* v. *General Motors Corp.*, 323 U.S. 373 (1944). In *General Motors Corp.*, the federal government, subsequent to filing of a condemnation action, gained complete use and occupancy of private property during World War II. The use and occupancy was for a temporary period. It was specifically because the government completely used and occupied the property that the court declared all or most of the interest in the property was deprived and that a taking occurred. The legal principle established in *General Motors Corp.*, is that where physical occupancy of the property exists, short of acquisition of title, a deprivation of all or most of an owner's interest in property will be found; therefore, a taking results. The legal principle established in *General Motors Corp.*, which the Court of Appeals in the present matter relied upon, is, therefore, limited by its factual setting.

The Court of Appeals has established a new and broad legal principle that when administrative action of a city in conduct of an urban renewal program results in devaluation of property, absent designation of specific property for condemnation and absent physical occupancy or use of the property, a taking occurs. The legal principle established, however, conflicts with the judicial mandate of the Court in *United States* v. *Cress*, *supra*, that the character of the invasion and not the amount of damage determines if a taking exists. It should be noted that the premise for the Court of Appeals' legal conclusion was based on faulty analysis and application of the *General Motors Corp.*, decision. *General Motors Corp.*, as limited by its facts, stands for a legal principle

that short of acquisition of title, the effect of physical occupancy subsequent to condemnation of property, which for a temporary period deprives the owner of the use of his property, constitutes a taking. The factual circumstance in *General Motors Corp.*, being vastly different from that in the present matter, limits the application of its legal principle and, therefore, was inappropriately relied upon by the Court of Appeals. Had the Court of Appeals applied the character of invasion test, it would have had to conclude that notwithstanding the damage to property by way of devaluation through administrative actions in conduct of the urban renewal plan, absent designation of specific property for condemnation or abuse of the condemnation process, and absent physical occupancy or use of the property, the mere devaluation of such property does not constitute a taking.

In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1977), the Court engaged in a thorough analysis of the history of its treatment of the taking clause. The Court, relating numerous judicial decisions, though reluctant to establish a set formula, clearly evidenced that absent factual circumstances which indicate abuse of condemnation authority or physical invasion of property or legislative action through statute, ordinance or zoning regulation, a taking under the Constitution will not exist.

The guidance of the Supreme Court, therefore, is necessary in the present matter to resolve an important issue of constitutional law, wherein the Court of Appeals has established a broad legal rule in conflict with Supreme Court principles.

B. Conflict With Other Courts Of Appeals' Decisions

In addition to the conflict present between the Court of Appeals and the Supreme Court decisions, the decision of the Sixth Circuit is also in conflict with other Courts of Appeals' decisions. In *Florida East Coast Properties, Inc.* v. *Metropolitan Dade County*, 572 F.2d 1108 (5th Cir. 1978), a property owner filed an inverse condemnation action against the County, alleging that the construction of a jail/work release facility on land adjacent to that of the property owner had caused a diminution in the market value of the property and, therefore, constituted a taking without just compensation. The Fifth Circuit affirmed the judgment of the District Court for the County, reiterating that "it is the character of the invasion, not the amount of damage which results from it, which determines the question of whether there has been a taking". *Florida East Coast Properties, Inc.*, 572 F.2d at 1111. The Court concluded that the absence of administrative action in the construction of the jail/work release facility specifically designated as an intrusion or interference upon the private property did not constitute a taking.

In *Barbian* v. *Panagis*, 694 F.2d 476 (7th Cir. 1982), a property owner alleged that the City of Milwaukee had deprived him the use of his property without just compensation by the granting of a permanent variance to an abutting property owner from a municipal noise ordinance. The Seventh Circuit established that the decline in market value was not conclusive in demonstration whether a taking occurred. The Court concluded that the municipal action may have contributed in the change of the character of the

neighborhood, however, it did not constitute a taking of property. *Barbian*, 694 F.2d at 485.

In *Ortega Cabrera* v. *Municipality of Bayamon*, 562 F.2d 91 (1st Cir. 1977), a property owner filed an inverse condemnation action alleging that the peaceful enjoyment of his property had been deprived by the adverse affect of an adjacent municipal dump. The Court stated:

> The recent cases in which takings have been found suggest that it may be that takings exist only when the diminution in values amounts to the total destruction of the value of an identifiable thing which is, or would have been, perceived by a reasonable owner as the subject of a distinct investment.

Ortega Cabrera, 562 F.2d at 100. The First Circuit stated that despite the governmental action in running the municipal dump which created bad smells and health hazards, the owner's use of his private property was not so impaired as to constitute a taking.

In *Florida East Coast Properties, Inc., supra*, the Court stated:

> Thus the *sine qua non* of a constitutional taking is a loss occasioned by an intrusion, interference or encroachment of some degree upon the private property owner's *rights* in his property. Consequential damages or losses are not enough.

Florida East Coast Properties, Inc., 572 F.2d at 1111. The Court went on to state:

> The essential inquiry is whether the injury to the private property owner is merely in the nature of a tortious invasion of his property rights or rises

> to the magnitude of an appropriation of some interest in his property.

Florida East Coast Properties, Inc., 572 F.2d at 1111. The Fifth Circuit in *Florida East Coast Properties, Inc.*, therefore, recognized that the diminution of value in property could merely constitute a tort and not a taking, dependent upon the character of the invasion. Absent specific designated governmental action against the specific private property, the Fifth Circuit found no taking to have occurred.

The conflict of the Sixth Circuit with the decisions of the First, Fifth and Seventh Circuits is apparent when recognized that in the present matter, the Sixth Circuit has established that a constitutional taking can occur by administrative action in the conduct of an urban renewal program which generally results in the devaluation of property in the neighborhood, absent designation of specific property for condemnation and absent physical occupancy or use of specific property. In essence, the Sixth Circuit has elevated alleged "tortious conduct" to that of a cause of action for unconstitutional taking of property under the Fifth and Fourteenth Amendments. The First, Fifth and Seventh Circuits, however, recognized that private property abutting government property will not be deemed taken due to diminution in value of such property by administrative action of the government.

The Court of Appeals' decision in the present matter, therefore, conflicts with the First, Fifth, and Seventh Circuit decisions, because the character of the Petitioner's administrative action was not designated at specific property but, instead, was generally part of its urban renewal program in the neighborhood. Likewise,

the First, Fifth and Seventh Circuit decisions emphasize that absent the specific action toward the private property (all property was abutting), a taking did not occur. This is further emphasized by the factual conclusion of the District Court and the Court of Appeals that the City allowed acquired property, which abuts the Respondents' property, to stay vacant, with residual impact on the neighborhood. The First, Fifth and Seventh Circuit legal principles, when applied to the conduct in the present matter, would dictate a different legal conclusion. An apparent conflict therefore exists.

It is necessary that the Supreme Court resolve the conflict in legal standards applied amongst the various Courts of Appeals. This is necessary to maintain uniformity which only the Supreme Court is empowered to do. The Supreme Court has, in previous decisions, granted a writ of certiorari to decide important questions of eminent domain law. *See: Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 471 (1972). Certiorari has also been granted where important constitutional issues have been raised. *See: Fuller* v. *Oregon*, 417 U.S. 40, 42 (1973); *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1973).

C. Intracircuit Conflict

The Court of Appeals' decision also presents an intracircuit conflict with the previous panels of the Sixth Circuit in *Sayre* v. *City of Cleveland*, 493 F.2d 64 (6th Cir. 1974) and *Woodland Market Realty Co.* v. *City of Cleveland*, 426 F.2d 955 (6th Cir. 1970). The Court of Appeals attempted to distinguish the applicability of *Sayre* and *Woodland* by asserting that the private property alleged to have been taken in those cases was located outside the area slated for redevelopment. *Amen*

v. *City of Dearborn*, 718 F.2d at 797. The Court thereby concluded that the present matter was distinguishable because property in the present case was located within the redevelopment area or had already been purchased by the City.

The Court of Appeals incorrectly distinguished *Sayre* and *Woodland* from the present case. In *Sayre*, a Trustee in bankruptcy for a land owner brought suit against the City of Cleveland alleging a taking of property without just compensation. The acts alleged to have comprised the taking consisted of the city contacting the land owner and notifying both the land owner and occupants that the city intended to acquire the property. The District Court granted summary judgment to the City on 107 of the 194 properties alleged to have been taken. The 107 properties were comprised of 29 parcels which had been acquired by the City and 78 parcels which were *outside* the urban renewal project area. Summary judgment for the City was denied as to the remaining 87 properties. The 87 properties were located *within* the urban renewal project area. *Sayre*, 493 F.2d at 67. The Court, in *Sayre*, discussing the significance of the location of the property and the attendant governmental administrative action toward the specific property, stated:

> . . . the crucial geographic boundary is *not that around the general planning area or the project area*, but around the property that the city has demonstrated that it intends to appropriate. (Emphasis supplied).

Sayre, 493 F.2d at 69. In *Sayre* the Sixth Circuit concluded that the city did not take any administrative action specifically designating the 87 parcels for condemnation, nor was any administrative action constituting physical invasion, occupancy or use of the property presented;

therefore, a taking did not occur. To the same extent, in the present matter, the Petitioner did not take administrative action specifically designating the property for condemnation nor was any property physically invaded or used by the Petitioner. As in *Sayre*, merely because the property in question herein fell within the general urban renewal project area does not constitute the crucial geographic boundary. Instead, the concern is whether the Petitioner has designated as to specific property, the intent to initiate condemnation proceedings or take other action constituting physical intrusion, occupancy or use of such property. The facts as found by the District and Appellate Court do not substantiate a taking under this analysis.

The Court of Appeals makes passing reference to the factual circumstance that the Petitioner "purchased" property, thereby distinguishing this case from *Sayre*. This assertion raises the separate and distinct legal issue as to whether negotiated purchase of property by a city can constitute a taking, or, based on the circumstances of the negotiation and purchase, the conduct would merely constitute alleged tortious activity. It should be noted, however, that in *Sayre*, 29 of the parcels in the lawsuit were acquired by the City, some of which were obtained through a negotiated sale. *Sayre*, 493 F.2d at 67, n.2. The District Court granted the City summary judgment as to those properties. Additionally, the District Court in the present matter, held that the combination of city actions *prior* to purchase of property by the city, constituted the taking.

The Sixth Circuit in *Sayre* engaged in a thorough discussion of what constitutes a "taking" of property, stating:

> We are unable to find any judicial support for the broad proposition advanced by appellee in his brief that there is an unconstitutional taking whenever a city, in the conduct of its urban renewal program, commits acts that lead to the devaluation of property. The converse of this proposition is particularly true where the city, as in this case, has neither initiated eminent domain proceedings, evidenced any intent to begin proceedings, or physically invaded the property . . . More typically, courts have found that although there can be no taking until the condemnation process was completed, factors such as governmental delay and inaction may be considered in setting the crucial date for valuing the property. *See City of Cleveland* v. *Carcione*, 118 Ohio App. 525, 190 N.E.2d 512 (1963), *City of Buffalo* v. *J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971). *Also, see*, generally, recent development, 72 Colum. L. Rev. 772, (1972). The rationale of these cases is that a de facto taking "requires a physical entry by the condemner or a physical ouster of the owner, or a legal interference with the physical use, possession or enjoyment of the property or legal interference with the owners' power of dispositions of the property." (Cite omitted).

Sayre, 493 F.2d at 69-70. *Sayre*, therefore, recognizes that the character of intrusion by governmental action which, in conduct of an urban renewal program, results in devaluation of property, absent designation of specific property for condemnation, or physical occupancy or use of the property, does not arise to an unconstitutional taking under the Fifth and Fourteenth Amendment. Application of that legal principle to the present matter would dictate a different legal conclusion herein.

The Court of Appeals also distinguished *Sayre* from the present case citing *Richmond Elks Hall Assn.* v. *Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977) and *Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979). *Amen, supra*, 718 F.2d at 797. Neither *Richmond Elks Hall Assn.* nor *Thomas W. Garland, Inc.* stand for the proposition asserted by the Court. In *Richmond Elks Hall Assn.*, the city designated an area for redevelopment, however, beyond that general plan, the property owner was given notice in writing that his specific property would be taken. Subsequently, the city declared that the property would be acquired by condemnation. Later, the property owner was told that the property would not be acquired. Both *Sayre* and *Woodland* were asserted in defense by the city. The Court of Appeals distinguished *Sayre* and *Woodland*, indicating that the properties in question in those cases were either outside the project area (*Woodland*) or not designated for acquisition (*Sayre*). *Richmond Elks Hall Assn.*, 561 F.2d at 1331. In *Richmond Elks Hall Assn.*, the private property was both within the general planning area and was specifically designated for acquisition by condemnation. That factual circumstance distinguishes the case from the present matter as well as *Sayre*. In the present case, portions of the South End and Eugene-Porath area were within the "general planning area," however, the Petitioner never designated a "geographical boundary" around any specific property for acquisition by condemnation. The fact that specific property was not so designated was evident in the city's choice not to utilize condemnation. In *Richmond Elks Hall Assn.*, the Court recognized that both *Sayre* and *Woodland* did not involve "property designated for condemnation by the public authority." *Richmond Elks Hall Assn.*, 561 F.2d at 1331. In *Richmond Elks Hall Assn.*, a taking was found; however,

unlike the case at bar, in that case, abuse of the condemnation power existed.

Thomas W. Garland, Inc. v. *City of St. Louis*, 596 F.2d 784 (8th Cir. 1979), was also relied upon by the Court of Appeals to distinguish *Sayre*. In *Thomas W. Garland, Inc.*, similar to *Richmond Elks Hall Assn.*, the private property was within a redevelopment area and was specifically designated for acquisition through a written notice that the property had to be vacated. Such specific designation as to property does not exist in the present matter.

In a further attempt to distinguish the applicability of *Sayre* and *Woodland* to the case at bar, the Court of Appeals relied upon two decisions from the same circuit, *Foster* v. *City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd* 405 F.2d 138 (6th Cir. 1968); and *Madison Realty Co.* v. *City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970). The Court relied on those decisions despite their stated limitation in *Sayre*. In *Foster*, formal condemnation proceedings were begun by the city in 1950 and *lis pendens* was filed. The Detroit City Council passed a resolution freezing the use of the property and prohibiting any new buildings or improvements without Council approval. In 1960, the condemnation suit was discontinued. In the interim, the property had deteriorated to the point that the property owner was ordered to tear the property down. In 1961, the condemnation proceeding was reinstituted and the property owner was compensated for the value of the empty land. The acts charged against the City and found by the Court to be a taking, *originated with the condemnation action* and were deliberately aimed at Plaintiff's property.

In *Madison Realty Co.*, formal condemnation proceedings were initiated against the property in 1964. In

1956, the Detroit City Council passed a resolution directing the Building Department to defer issuance of building permits in the area. The Court found that the City had physically isolated the property by the blocking of streets so as to make access difficult and had denied the property owner police protection and most other city services. The Court concluded that the City's "official acts . . . were calculated to mark the subject property as prey for the bulldozer and which had the effect of tying the owner to the building, thereby negating any bargaining position . . ." *Madison Realty Co.*, 315 F. Supp. at 371.

The common thread between *Foster* and *Madison Realty Co.* is the initiation of condemnation and deliberate policy actions of the city aimed specifically at the property in question. Unlike the factual circumstances in *Foster* and *Madison Realty Co.*, in the case at bar, condemnation was never initiated nor intended. The District and Appellate Courts did not find proof that Council resolutions were ever passed implementing deliberate policy to deny repair or building permits, nor did any scheme exist to deny such permits. The City services were not reduced by the Petitioner and, in fact, were equal to those provided elsewhere in the City. The City never physically invaded or interfered with the property of anyone in the South End or Eugene-Porath areas.

That *Foster* and *Madison Realty Co.* are distinguishable from the case at bar, is recognized in *Sayre*. Construing *Foster*, the Court stated:

> *Foster* was a recognition that an urban renewal authority, by *abusing its power of eminent domain*, may cause such substantial damage to property that it is actually "taken" within the meaning of the Fifth and Fourteenth Amendments. (Emphasis supplied).

Sayre, 493 F.2d at 69. The Court in *Sayre* also remarked as to *Foster*:

> This Court affirmed the District Court's decision *although our opinion was directed mainly to procedural issues* raised by the city on appeal. (Emphasis supplied).

Sayre, 493 F.2d at 66. The Court in *Sayre*, emphasizing the importance in a taking inquiry as to government action designating specific property for condemnation, remarked as to *Foster*:

> Absent the abuse of eminent domain found in *Foster*, including some action by the city indicating that *the particular piece of property at issue*, is to be appropriated, economic loss caused by urban renewal does not constitute a taking within the meaning of the Fifth and Fourteenth Amendments. (Court's emphasis).

Sayre, 493 F.2d at 69. In *Sayre*, the Court, therefore, emphasized and recognized that the crux of Mr. Foster's problem was the underlying condemnation proceeding and the abuse thereof. *Foster* was further distinguished in *Clinton Street Greater Bethlehem Church* v. *City of Detroit*, 484 F.2d 185 (6th Cir. 1973), wherein the Court stated:

> The important distinction between the Appellants alleged harm and the problems encountered by Mr. Foster *is that all of Mr. Foster's problems stem from his being subject to the 1950 condemnation action*. (Cite omitted). The affirmative acts of the City which led the District Court to conclude that a taking had occurred prior to 1962 were all *actions taken by the City in accordance with the condemnation action* which it later abandoned . . . (emphasis supplied).

Clinton Street Greater Bethlehem Church, 484 F.2d at 188.

The Court in *Sayre* also construed the applicability of the *Madison Realty Co.* decision, stating:

> We are aware that in *Madison Realty Company* v. *City of Detroit*, 315 F. Supp. 367 (E.D. Mich. 1970) a District Court of this Circuit said the "initiation of eminent domain proceedings is not a requisite to a finding that a 'taking' has in fact occurred allowing for recovery by a property owner." 315 F. Supp. at 371. However, that case, like all others, is limited to its particular facts. The District Court found in that case that the property owner had been notified by the City officials that his land would be acquired. *Furthermore, after considerable delay, the city initiated formal eminent domain proceedings.* (Emphasis supplied).

Sayre, 493 F.2d at 69, n.4. *Sayre*, therefore, recognizes that in both *Foster* and *Madison Realty Co.* the significance is the abuse of eminent domain. Standards set forth in *Sayre*, therefore, recognize where the abuse of eminent domain exists, a taking can occur. Specifically, abuse of the eminent domain process is what sets *Madison Realty Co.* and *Foster* apart from the case at bar. *See also: Donohoe Construction Co., Inc.* v. *Montgomery County Council*, 567 F.2d 603 (4th Cir. 1977), (distinguishing *Foster* on the basis of abuse of condemnation authority).

The reliance by the Court of Appeals in the present matter on decisions in *Richmond Elks Hall Assn.*, *Foster*, and *Madison Realty Co.* are clearly distinguishable from the Sixth Circuit decision in *Sayre*, and do not impair its validity in relation to the present matter but instead render *Sayre* in direct conflict with the Court of Appeals' holding herein. In *Sayre*, the Sixth Circuit recognized as

a general rule that diminution in value of property located within an urban renewal project area will not constitute a taking absent governmental action designating specific property for condemnation, or physical ouster of an owner or physical invasion of property. The Court of Appeals herein, however, has established a rule that the diminution in value in the urban renewal project area shall constitute a taking despite absence of specific administrative action designating property for condemnation, or physical invasion of such property.

It is appropriate for the Supreme Court to issue a writ of certiorari to resolve an important intracircuit conflict dealing with an important constitutional issue. The Supreme Court has, in previous decisions, issued a writ of certiorari to resolve such intracircuit conflicts. *See: John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U.S. 180, 181 (1939); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 510-511 (1949).

D. Importance Of Issue

Notwithstanding the conflicts which are apparent between the Court of Appeals' decision and various decisions of the Supreme Court, other Courts of Appeals, and intracircuit decisions, this Court is requested to issue a writ of certiorari due to the importance of the issue presented. As this Court recognized in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1977), it has been unable to develop a "set formula" to determine when a constitutional taking of property exists. Despite the Court's inability to establish a "set formula," it has in *Penn Central Transportation Co.*, undertaken a thorough analysis which provides a workable guideline as to judicial inquiry on the taking

issue. The tenor of the decisions cited therein recognize that inverse condemnation will constitute a taking where there exists: abuse of condemnation proceedings against specific property; physical ouster of an owner or invasion of property as in the aircraft and navigable waters decisions; and government regulation by statute and ordinance such as the zoning regulation decisions. The Supreme Court has never directly addressed whether an unconstitutional taking of property can exist by administrative action by the executive branch of government.

If the Court of Appeals' decision is not reviewed by this Court, grave consequences would result for municipalities desiring, on behalf of the public, to engage in urban renewal. The Court of Appeals' decision has the effect of establishing that a municipality absent initiation of condemnation or physical invasion of property will, by administrative actions in the conduct of an urban renewal program, be liable for damages caused in the devaluation of property. This result will be created absent administrative action designated at specific property. An immediate chilling effect will result thereby deterring cities from engaging in urban renewal. The impact will be that general designation of urban renewal project areas for redevelopment will be eliminated in favor of isolated and specific parcel-by-parcel condemnation proceedings. Municipalities will reasonably fear that the mere inclusion of properties within a preliminary neighborhood planning area or urban renewal project area and the public announcement of such inclusion, may trigger "taking" claims even though in the context of a long-range urban renewal program, there is absolutely no municipal intention to seek within a specified period, condemnation of some or

all of the properties within the project area. A municipality would either myopically limit its urban renewal planning activities to specific confined areas and to total eminent domain acquisition within those areas, or not to plan at all unless it is willing to face astronomical damage claims. Moreover, municipalities will be discouraged from publicly announcing neighborhood-wide plans in advance of actual implementation but, instead, will be encouraged to engage in the converse policy of secrecy. Nothing could be more damaging to a democratic society and to the duty owed the citizens at large. Additionally, municipalities will be forced into abandoning long-range urban renewal projects because of the implied "delay in governmental action" in favor of short-term projects. The difficulty presented with such short-term projects is the absence of sufficient municipal finances for completion; therefore, such programs may never be initiated.

The Court of Appeals, by disregarding the established "taking" prerequisites of abuse of eminent domain or physical invasion, has rendered municipalities vulnerable to a variety of damage claims brought in the guise of "taking," which otherwise would have been barred by state sovereign immunity principles. Actions which constitute common law tortious conduct should not be elevated to unconstitutional taking claims. As such, any negligence claim filed in a state court can be magically transformed into a claim for relief under the Fifth and Fourteenth Amendment, thereby conveniently avoiding the Federal jurisdictional requirement of diversity of citizenship and the bar of Michigan sovereign immunity doctrines.

Of further impact is the recognition that property which has not been physically and permanently invaded

or specifically designated for condemnation, may still fluctuate in value. Courts would find themselves permitting juries to compensate property owners for temporary declines in property value that are a normal risk of property ownership. This result is especially disturbing in urban renewal areas where the very reason for municipal involvement is first to attempt to halt the spread of slums and blight and the consequent decline in the value of properties within those areas, and, thereafter, to increase property values in the long run. To compensate a property owner in such a neighborhood for a temporary decline in his property value would be to grant him a windfall at taxpayers' expense. Moreover, such a result would again encourage the real estate speculation that has previously occurred in the blighted areas of our cities.

Absent evidence of specific property being designated for condemnation or physical ouster of an owner or physical invasion of such property, courts and juries should not be permitted to infer that a city would set out to deliberately destroy property values. Otherwise, nearly every reduction in property value would be attributed to a city's secret or sublimated motive to appropriate the property at some future date.

Based on the importance of this constitutional issue and the necessity that municipalities have guidance in the scope of liability in urban renewal project activities; and, premised on the conflict between the Sixth Circuit decision and decisions of the Supreme Court, other Courts of Appeals, and previous panels of the Sixth Circuit, it is requested that a writ of certiorari issue in the present matter.

CONCLUSION

Based on the aforesaid, Petitioner, City of Dearborn, respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit, decided and filed on October 6, 1983.

Respectfully submitted,

LAW OFFICES OF BARRY L. HOWARD

By: /s/ BARRY L. HOWARD
19675 W. Ten Mile Road
Southfield, MI 48075
Counsel for Petitioner

By: /s/ FRANK A. GUIDO
19675 W. Ten Mile Road
Southfield, MI 48075
Of Counsel

By: /s/ WILLIAM C. HULTGREN
13615 Michigan Avenue
Dearborn, MI 48126
Of Counsel

Dated: January 2, 1984

PETITIONER'S APPENDIX

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed October 6, 1983)

(Katherine Amen, et al., Plaintiffs-Appellees/Cross-Appellants, v. City of Dearborn, A Municipal Corporation, et al., Defendants-Appellants/Cross-Appellees — Nos. 82-1281, 82-1282; Appeal from the United States District Court for the Eastern District of Michigan)

Before: Contie, Circuit Judge, and Phillips and Celebrezze, Senior Circuit Judges.

Phillips, Senior Circuit Judge.

This is the second appeal in this class action brought on behalf of present and former residents of the South End and Eugene-Porath neighborhoods in the southeast section of Dearborn, Michigan. Senior District Judge Ralph M. Freeman held, inter alia, that the City of Dearborn had engaged in an unconstitutional course of conduct which deprived plaintiffs of their private property without just compensation. *Amen* v. *City of Dearborn*, 363 F. Supp. 1267 (E.D.Mich. 1973). On the prior appeal, this court remanded on jurisdictional grounds without addressing the substantive merits of the dispute. *Amen* v. *City of Dearborn*, 532 F.2d 554 (6th Cir. 1976). On remand, the district court held that it had subject-matter jurisdiction over the City pursuant to 28 U.S.C. § 1331, and thereafter reinstated its former judgment. The present appeal followed, with the City challenging the decision of the district court on the

merits and also the finding of jurisdiction under § 1331. Plaintiffs cross-appeal the district court's refusal to find jurisdiction over the City pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3). Reference is made to the reported decision of the district court for a detailed recitation of pertinent facts. *See* 363 F. Supp. at 1271-76.

For the reasons set forth below, the decision of the district court is affirmed in part, and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

I.

The complaint in this case was filed in October 1971. Jurisdiction over the City was predicated upon two grounds, the general federal question jurisdictional statute, 28 U.S.C. § 1331,[1] and the civil rights jurisdictional statute, 28 U.S.C. § 1343(3).[2] Relying on

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[1] At that time 28 U.S.C. § 1331 provided, in part, as follows:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

[2] 28 U.S.C. § 1343 (3) provides as follows:

> The distirct courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

City of Kenosha v. *Bruno*, 412 U.S. 507 (1973) and *Moor* v. *County of Alameda*, 411 U.S. 693, *reh'g denied*, 412 U.S. 963 (1973), the district court held that the City could not be sued under 42 U.S.C. § 1983 and its jurisdictional statute, § 1343(3). *See* 363 F. Supp. at 1270. However, the court concluded that the City could be sued directly for fourteenth amendment violations under § 1331. *Id.*

On appeal, this court affirmed the district court's conclusion that jurisdiction over the City could not lie under § 1343(3).[3] *See* 532 F. 2d at 558. Although noting that the City could be sued directly for fourteenth amendment violations under § 1331,[4] this court found the record insufficient as to whether each plaintiff satisfied § 1331's jurisdictional amount requirement. *Id.* at 559-560. *See Zahn* v. *International Paper Co.*, 414 U.S. 291, 302 n.11 (1973) (under § 1331 each class member asserting "separate and distinct claims" had to satisfy the jurisdictional amount requirement). Accordingly, the cause was remanded "in order that the District Court may make specific and detailed findings of jurisdiction." 532 F. 2d at 560, quoting *Patrician Towers Owners, Inc.* v. *Fairchild*, 513 F. 2d 216, 222 (4th Cir. 1975).

On remand, plaintiffs moved the district court for an order establishing procedures to be followed in determining the amount in controversy as to each class

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[3] This court held also that the city council, city plan commission, city building and safety division and other city departments could not be sued under § 1983 and through §1343(3). *See* 532 F.2d at 559 & n.8.

[4] Because an alleged "taking" in violation of the fifth and fourteenth amendments presents a serious constitutional question, a direct cause of action lies within the district court's federal question jurisdiction. *See Gordon* v. *City of Warren*, 579 F.2d 386, 391 (6th Cir. 1978); *Muskegon Theatres, Inc.* v. *City of Muskegon*, 507 F.2d 199, 200 (6th Cir. 1974).

member. Additionally, plaintiffs requested the court to make a finding of jurisdiction under § 1343(3) in light of the intervening decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). It was plaintiffs' position that if § 1343(3) jurisdiction could be established in light of *Monell*, each member of the class would not have to meet the $10,000 jurisdictional minimum since § 1343(3) does not require any monetary amount to be in controversy.

In an unreported memorandum opinion Judge Freeman denied plaintiffs' bid to establish jurisdiction under § 1343(3), holding that condideration of *Monell* would be to act "far beyond the scope of the Court of Appeals' mandate." *Amen* v. *City of Dearborn*, No. 37242, slip op. at 6 (E.D. Mich. Dec. 26, 1979). In an unpublished order, this court denied plaintiffs' motion to amend the mandate for consideration of *Monell*.[5] *Amen* v. *City of Dearborn*, No. 74-1650 (6th Cir. March 21, 1980).

Thereafter, the district court began developing procedures to determine whether the individual class members could satisfy the amount in controversy requirement. During this process, however, Congress amended § 1331 to eliminate the jurisdictional amount requirement.[6] *See* Federal Question Jurisdictional Amendment Act of 1980, Pub. L. No. 96, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331 (Supp. IV

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[5] The order, in part, stated that "this Court is without jurisdiction to amend the mandate at this late date."

[6] 28 U.S.C. § 1331, as amended, provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

1980)). Relying upon the explicit language of § 4 of the Act, which states that the Act shall apply immediately to any "pending" civil action, the district court held that it had jurisdiction under § 1331 notwithstanding the amount in controversy.

On appeal, the City contends that the district court violated this court's mandate and the law of the case doctrine in finding subject-matter jurisdiction under § 1331, as amended. Plaintiffs cross-appeal the district court's refusal to consider jurisdiction under § 1343(3). We find these claims to be without merit and hold that the district court properly found jurisdiction over the City under the amended version of § 1331.

The district court did not go beyond the terms of the mandate on remand. The mandate directed the district court to make findings of jurisdiction under § 1331. This is precisely what the district court did in analyzing and applying the amended version of § 1331.

The Federal Question Jurisdictional Amendment clearly applies to the instant case. The effective date of the Act was December 1, 1980. Section 4 of the Act provides that the Act "shall apply to any civil action pending on the date of enactment of this Act." It is evident that the issue of jurisdiction under § 1331 was "pending" on the effective date of the Act since it was under further consideration pursuant to this court's mandate. The courts have applied the Act retroactively and to actions pending appeal. *See, e.g., Barany* v. *Buller*, 670 F. 2d 726, 732 & n.12 (7th Cir. 1982); *Eikenberry* v. *Callahan*, 653 F. 2d 632, 635, 636 (D.C. Cir. 1981); *Ellis* v. *Blum*, 643 F. 2d 68, 85 (2d Cir. 1981); *Theriault* v. *Brennan*, 641 F. 2d 28, 29 n. 1 (1st Cir. 1981).

Our decision is supported also by the legislative history of the Act. Congress stated unequivocally its intent "that this bill shall apply to any civil action pending in Federal court on the date of enactment. By putting congressional intent into immediate effect, *this provision will eliminate on-going jurisdictional battles, thus saving valuable court time.*" H. R. Rep. No. 96-1461, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5063, 5066 (emphasis added). In the instant case it is undisputed that the parties have been engaged in an on-going jurisdictional battle. This battle was resolved by the application of § 1331, as amended. To ignore the amended version of § 1331 not only would frustrate the intent of Congress, but would result in an unnecessary and unreasonable expenditure of time and money in this protracted litigation.

The City argues further that the district court violated the law of the case doctrine in applying § 1331, as amended. *See In re United States Steel Corp.* 479 F.2d 489, 493-94 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973), for a discussion of the law of the case doctrine. The short answer to this claim is that the law of the case doctrine does not foreclose reconsideration of subject-matter jurisdiction. *See, e.g., Green* v. *Department of Commerce*, 618 F. 2d 836, 839 n.9 (D.C.Cir. 1980); *Potomac Passengers Assoc.* v. *Chesapeake & Ohio Ry. Co.*, 520 F.2d 91, 95 n.22 (D. C. Cir. 1975). Moreover, the doctrine is not so rigid as the rule of res judicata, *Southern Ry. Co.* v. *Clift*, 260 U.S. 316, 319 (1922), and there is a well-recognized exception that the doctrine must yield to an intervening change of controlling law between the date of the first ruling and the retrial. *See EEOC* v. *International Longshoremen's Assoc.*, 623 F.2d 1054, 1058 (5th Cir. 1980), *cert. denied*, 451 U.S. 917 (1981); *In re United States Steel Corp., supra*, 479 F.2d at 494; 1B J. Moore, *Moore's Federal Practice* ¶ 0.404 [10], at 575-76 (1982).

Accordingly, we hold that the district court acted properly in finding jurisdiction over the City under the amended version of § 1331.

Plaintiffs' sole contention in their cross-appeal is that the district court erred in refusing to apply *Monell, supra*, 436 U.S. 658 (1978), on remand to establish jurisdiction over the City through 28 U.S.C. § 1343(3). Plaintiffs' claim for relief under § 1983 was dismissed by the district court in 1973 and this court affirmed the dismissal two years before the Supreme Court decided *Monell*. The merits of the cross-appeal are largely irrelevant in light of our holding that jurisdiction over the City exists under § 1331. Accordingly, we need not decide whether § 1343(3) would be an additional and proper jurisdictional basis for this action. *Cf. Moore* v. *Zarra*, 700 F.2d 329, 330 (6th Cir. 1983); *Pennsylvania* v. *Porter*, 659 F.2d 306, 314 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 3509 (1982).

II.

The fifth amendment, made applicable to the states by the fourteenth amendment, provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. The district court found that the City had engaged in a course of conduct which ultimately forced residents to sell their property to the City and that this conduct amounted to a taking without just compensation. *See* 363 F.Supp. at 1272-76. The court held further that several of the City's acquisitions were illegal because the City failed to state sufficiently a "public purpose" for its actions. *Id.* at 1279. Although we conclude that the City acted pursuant to a stated public purpose, we agree with the district court that the City engaged in an unconstitutional course of conduct which amounted to a taking of private property without just compensation.

A.

Governmental action which places a burden on an individual's property which in fairness the entire community should share constitutes a taking and the government must compensate the property owner for the loss. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980). The government may violate the Taking Clause of the fifth amendment by denying an owner dominion over his property without invoking the formal power of eminent domain. *See United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174 n.8 (1979). Accordingly, the ultimate resolution of whether the government has unconstitutionally taken private property follows an ad hoc factual determination that the community, rather than the property owner, fairly should assume the cost of the official action. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-24, *reh'g denied*, 439 U.S. 883 (1978).

For fifth amendment purposes, the definition of property is broad, encompassing the entire group of rights incidental to ownership. *See PruneYard Shopping Center, supra*, 447 U.S. at 82 n.6; *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-78 (1945). However, a taking does not occur merely because governmental action burdens or restricts some particular right or interest in a parcel of land. Rather, before a taking occurs the government must deny the owner all or an essential use of his property. *PruneYard Shopping Center, supra*, 447 U.S. at 82, 84.

As indicated, the district court found that the City engaged in several activities designed to force residents in the southeast section of Dearborn to sell their property to the City. As identified by the district court, such activities included:

1. The City has used its power to issue building permits, repair permits and occupancy permits to encourage people to move out by denying permits, verbally discouraging repairs, or causing unreasonable delay in the issuance of permits. The City also occasionally required complete remodeling of a house when a permit for only one kind of remodeling or repair was requested. Some persons in the subject areas also signed forms stating that any repairs permitted by the City would not be taken into account in computing the value of their home should the City later acquire it.

2. Manarino, City Director of the Community Development Department, told people in the areas that the prices paid by the City for their properties would be going down or that there was a fixed maximum price for homes in the area.

3. The City has required persons in the South End to perform maintenance and install items not required by the building code, including the installation of mechanical garbage disposal units under an ordinance which does not compel mechanical disposals as the only method of garbage disposal.

4. Many persons have solicited the court during the pendency of the temporary injunction asking that they be permitted to sell because, among other reasons, they fear that they cannot comply with the Dearborn building code. That indicates the effect of activities of the City in denying permits or requiring excessive repairs.

5. A city attorney, acting as attorney for an estate that owned property in the Eugene-Porath area, told the family that the City would purchase that property. He also told the family that it would be difficult to get an occupancy permit for the home because the City wanted to clear the area and consequently the inspectors would be very hard on the property in question.

6. The City has held many meetings in the South End with residents and has told them repeatedly that the South End will be cleared, north of Lapeer or north of Lowery.

7. The City has made press releases stating that Eugene-Porath and parts of the South End will be cleared.

8. The City has posted various signs throughout these areas which encourage people to sell to the City. On occasion the City has posted large signs which said, "Whoever wishes to sell to the City of Dearborn, call City Attorney," followed by a telephone number. The City has posted signs, "Sold to City of Dearborn" on property acquired by the City in these areas.

9. The City has allowed property it has acquired to remain vacant and unprotected, to induce neighbors to sell. On some of these properties the City posted signs which stated, "Free at your risk, take any part of the house. First come, first served. Hurry." These signs precipitated stripping of the houses to the consternation of the neighborhood.

363 F. Supp at 1272-73.

The findings are supported adequately by the record, and, therefore, are not clearly erroneous. Fed. R. Civ. P. 52(a). We reject the City's claim that this court is not bound by the clearly erroneous standard and may engage in an independent examination of the record. *See, e.g., Urbanizadora Versalles, Inc.* v. *Rios*, 701 F.2d 993, 996 (1st Cir. 1983) (finding that freezing of plaintiff's land for unreasonable period of time amounted to an unconstitutional taking not erroneous); *National Western Insurance Co.* v. *Commodore Cove Improvement District*, 678 F.2d 24, 28 (5th Cir. 1982) (finding not clearly erroneous that regulation did not diminish property value and amount to a taking); *Harris* v. *United States*, 467 F.2d 801, 803 (8th Cir. 1972) (finding not clearly erroneous that governmental action did not amount to an unconstitutional taking).

The district court held that although none of the City's activities alone may have constituted a taking of private property, the combination of the City's actions resulted in a taking for which just compensation is due. *See* 363 F.Supp at 1277-78. On appeal, the City takes the position that the district court erred in finding a fifth amendment violation, as a fifth amendment taking cannot occur in the absence of condemnation proceedings or a physical intrusion and that the mere diminution in property value due to the City's conduct is insufficient to sustain a taking in violation of the fifth and fourteenth amendments. We conclude that the City's position on this issue is without merit.

While the mere decline in property values does not, per se, constitute a taking requiring compensation, *Danforth* v. *United States*, 308 U.S. 271, 285 (1939), governmental action short of acquisition may constitute a constructive taking "if its effects are so complete as to

deprive the owner of all or most of his interest in the subject matter." *General Motors Corp., supra*, 323 U.S. at 378. A case similar to the instant action is *Richmond Elks Hall Assoc.* v. *Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977). In that case, plaintiff's property was located within an area designated by the City of Richmond as blighted and scheduled for redevelopment. The redevelopment project was given widescale publicity and a purchase schedule for properties was established. For a number of years the City pursued its redevelopment plans and acquired several properties. As a result, property owners in the redevelopment area were unable to secure insurance and loans for improvement and upkeep. Additionally, due to the impending redevelopment, plaintiff suffered a substantial decline in rental income. Accordingly, when the City failed to purchase the Elks Association's property, plaintiff filed suit alleging a taking under the fifth and fourteenth amendments. The Ninth Circuit found that a compensable taking of plaintiff's property had occurred because the City's actions had rendered the property unsaleable and its intended use "severely limited". The court held that "[w]hen a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid." 561 F.2d at 1330. *See also Drakes Bay Land Co.* v. *United States*, 424 F.2d 574, 584 (Ct. Cl. 1970).

The court in *Richmond Elks Hall Assoc., supra*, relied upon two decisions from this circuit, *Foster* v. *City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968) and *Madison Realty Co.* v. *City of Detroit*, 315 F.Supp. 367 (E.D. Mich. 1970). In *Foster*, the City of Detroit announced condemnation proceedings

against an area which included plaintiff's property. Plaintiffs were instructed not to make improvements to their property because they would not be compensated for such by the City. After ten years, the City discontinued condemnation proceedings without acquiring plaintiffs' property. Consequently, plaintiffs' property was vandalized and not rentable due in part to the change in the neighborhood. After plaintiffs were forced to raze their buildings, the City reinstated condemnation proceedings and compensated plaintiffs for the value of their vacant lots. The court found that the actions of the City contributed substantially to and accelerated the decline of property values in the affected area. Accordingly, this court in *Foster* held that the actions of the City constituted an unconstitutional taking of property before the actual condemnation of the property occurred.

Likewise, in *Madison Realty Co., supra*, District Judge Damon J. Keith found an unconstitutional taking when the City failed to invoke its powers of eminent domain despite its continuous threats to institute condemnation proceedings. The court found that the actions of the City, which included denials of building permits, denial of property reassessment for tax purposes, continued publication of redevelopment plans and denial of some city services, caused a signifcant reduction in the value of plaintiffs' property. The court held that such conduct constituted a taking of property within the meaning of the fifth amendment.

These decisions demonstrate clearly that activities other than actual condemnation and physical intrusion can offend the Taking Clause. In the instant action, the record supports substantially the district court's holding that the City engaged in an unconstitutional course of

conduct which effectively forced residents to sell their homes to the City. We find the overall conduct of the City not dissimilar to the conduct admonished in *Foster, supra,* and *Madison Realty Co., supra.* It is undisputed that the City of Dearborn made clear its intent to purchase and redevelop property on the South-End and Eugene-Porath areas. Notwithstanding this intent however, the City chose not to invoke its condemnation powers, but rather, elected to engage in a deliberate course of conduct to force the sale of private property at reduced value.

In arguing that its conduct did not amount to an unconstitutional taking, the City relies upon *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F.2d 955 (6th Cir. 1970) and *Sayre* v. *City of Cleveland,* 493 F.2d 64 (6th Cir.) *cert. denied,* 419 U.S. 837 (1974). The City's reliance on these decisions is misplaced, because both cases are distinguishable from the present case.

In *Woodland Market Realty Co., supra,* the property at issue was included within the proposed redevelopment project area but was excluded prior to any official action. As a consequence, the land was never part of the project and remained outside the affected area. Likewise, in *Sayre, supra,* the properties under dispute were never designated for appropriation under the urban renewal plan. The key feature in both *Woodland Market Realty* and *Sayre* is that the property in those cases was located outside the areas slated for redevelopment.

In contrast, it is undisputed in the present case that the City included the entire Eugene-Porath area and a large portion of the South-End area in its clearance and redevelopment project plans. Plaintiffs either live in houses which have been designated for appropriation or have already sold their property to the City. In *Sayre,* the significance of the property's location is noted as follows:

> *Woodland Market* acknowledges the authority of the legislative body to draw it own lines around the property it wishes to condemn by eminent domain. And the crucial geographic boundary is not that around the general planning area or the project area, but around the property that the city has demonstrated that it intends to appropriate. Absent the abuse of eminent domain found in *Foster*, including some action by the city indicating that *the particular piece of property at issue* is to be appropriated, economic loss caused by urban renewal does not constitute a taking within the meaning of the fifth and fourteenth amendments.

493 F.2d at 69 (footnote omitted). Other decisions also emphasize this distinction. *See, e.g., Thomas W. Garland, Inc.* v. *City of St. Louis*, 596 F.2d 784, 788-89 (8th Cir.) *cert. denied*, 444 U.S. 899 (1979); *Richmond Elks Hall Assoc. supra*, 561 F.2d at 1331; *Clinton Street Greater Bethlehem Church* v. *City of Detroit*, 484 F.2d 185, 188 (6th Cir. 1973). Because the City intended to appropriate plaintiffs' properties, or has already done so, we find *Woodland Market Realty Co., supra* and *Sayre, supra*, inapposite to the present case.

Accordingly, we hold that the City's deliberate course of conduct caused such substantial damage to plaintiffs' properties that the properties in effect were actually taken within the meaning of the fifth and fourteenth amendments for which just compensation is due.

B.

It is undisputed that the City of Dearborn possess statutory authority to purchase or condemn private property for any public use or purpose. *See* Mich. Comp.

Laws Ann. § 117.4(e)(2) (1967) (Mich. Stat. Ann. § 5.2078 (Callaghan 1978)). The district court held however, that a number of the City's urban renewal programs lacked a formal declaration of a public purpose and, therefore, several properties were obtained illegally. *See* 363 F.Supp, at 1278-80. We find this conclusion unsupported by the record and, accordingly, hold that the City's acquisition of properties was pursuant to a sufficiently stated public purpose.

So long as a public entity has authority to purchase or condemn private property, the appropriate subject for inquiry is whether the taking was for a public purpose. *Berman* v. *Parker*, 348 U.S. 26, 33 (1954). The standard of judicial review in determining whether the public entity purchased or condemned private property for a public purpose is extremely narrow. *Berman, supra*, 348 U.S. at 32; *United States ex rel. TVA* v. *Two Tracts of Land, etc.*, 532 F. 2d 1083, 1084 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976). However, a taking will be nullified as not being for a public purpose when it is demonstrated that the public entity acted in an arbitrary manner or in bad faith. *See United States* v. *416.81 Acres of Land, etc.*, 514 F.2d 627, 631-32 (7th Cir. 1975); *United States* v. *Agee*, 322 F.2d 139, 142 (6th Cir. 1963).

In the present case the record indicates that the City Council adopted a Master Plan for redevelopment purposes in the early 1960s. This plan included a housing classification map categorizing plaintiffs' properties as "conservation" or "redevelopment" areas. Such classification was required under State law. *See* Mich. Comp. Laws Ann. § 125.36 (1976) (Mich. Stat. Ann. § 5.2996 (Callaghan 1982)). The Master Plan is comprehensive and reflects the City's long-range

aspirations in the orderly development and improvement of Dearborn. To implement the urban renewal goals contained in the Master Plan, the City Council adopted a number of Capital Improvement Planning Programs. (CIPP). Each CIPP focused on a particular clearance project which would be undertaken in a specifically designated area in Dearborn.

The district court examined each adopted CIPP to determine if a public purpose was stated adequately for each clearance project. If the CIPP indicated that a clearing plan was designed to clear "slum" areas, the district court found the public purpose requirement satisfied. If however, the CIPP did not include the specific reason for the clearing plan, the court found no stated public purpose and, consequently, declared illegal any acquisitions made pursuant to that plan. *See* 363 F.Supp. at 1278-79.

We conclude that the district court's standard of review was too restrictive in that it ignored the overall urban renewal goals articulated by the City. The Master Plan spelled out the City's desire to rehabilitate and redevelop particular areas in Dearborn classified as "slums" and "blighted". Under Michigan law, acquisition of private property for clearance and redevelopment is recognized as a permissible public purpose.

See Sinas v. *City of Lansing*, 382 Mich. 407, 412, 170 N.W.2d 23, 26 (1969); *In re Slum Clearance*, 331 Mich. 714, 720, 50 N.W.2d 340, 344 (1951). The clearance projects, as outlined in each CIPP, were adopted by the City as the sole means of implementing the goals set forth in the Master Plan. Further, it is important to note that each CIPP incorporated by reference the Master Plan and the

City's concern over slum conditions and the need for redevelopment. The "Forward" to each CIPP provided, in part, as follows:

> The Capital Improvement Planning Program is directly related to the Master Plan of the City. It establishes a long-range financing program for implementing elements of the Master Plan over a period of time. Act 285 of the Public Acts of 1931, as amended, provides that the City Plan Commission shall prepare and adopt, from time to time modify, and have custody of a Master Plan of the City showing present and planned physical development. The purpose of the Plan is to provide for the improvement of the city, its future growth and development, and promote the health, safety and general welfare of its population. The City Plan Commission completed and approved in 1962 a Master Plan for the City of Dearborn.
>
> The Plan was developed after a thorough study of trends in population and employment and estimates of the needs of commerce, industry, and the people with regard to land, transportation, housing, recreation, and community facilities.

This statement, coupled with the long-range goals announced in the City's Master Plan, demonstrates that the City acted pursuant to a valid and sufficiently declared public purpose. Accordingly, we hold that the City's acquisitions were pursuant to a public purpose, and, therefore, that portion of the district court's judgment ordering the City to divest itself of properties obtained illegally is reversed.

C.

The district court found that the City did not offer "fair compensation" to property owners in the South End and Eugene-Porath areas, thereby depriving plaintiffs of private property without just compensation, 363 F.Supp. at 1275. We agree. In *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 473-74 (1973), the Supreme Court defined just compensation as follows:

> " '[J]ust compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 [1970] (footnotes omitted). See also *United States* v. *Miller*, 317 U.S. 369, 373 [1943]. To determine such monetary equivalence, the Court early established the concept of "market value": the owner is entitled to the fair market value of his property at the time of the taking. *New York* v. *Sage*, 239 U.S. 57, 61 [1915]. See also *United States* v. *Reynolds, supra*, [397 U.S.] at 16; *United States* v. *Miller, supra*, [317 U.S.] at 374. And this value is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller." [*Miller, supra*, 317 U.S. at 374]. See *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 633 [1961].

See also United States v. *103.38 Acres of Land, More or Less, etc.*, 660 F.2d 208, 211 (6th Cir. 1981).

On appeal, the City does not challenge the detailed findings made by the district court on this issue. Rather, the City claims that "those individuals that sold their

property to the City did so through fair, arms length negotiations fully knowing the value of their property." We reject this claim as being completely unsupported by the record.

Prices paid or offered by the City were based upon factors which inherently produced an artificially low market value for property located in the South End and Eugene-Porath areas. One method of appraisal employed by the City was to pay owners a price based upon the estimated market value of comparable property in the immediate area. The unfairness inherent in this method is that the market value of the property in the immediate area already had experienced a substantial decline due to the City's clearance activities. Thus, the use of a value-depressed parcel resulted automatically in a lower appraisal value for the property being solicited by the City. Additionally, the record reveals that property values were assessed according to such factors as low tax assessments, the original purchase price with no account taken for unrealized gain, or on lot size only without additional compensation for the structure on the lot.

From these facts it is difficult to ascertain how any home owner could have received the fair market value of his or her property at the time of the taking. Accordingly, the record supports the conclusion that the City unlawfully deprived plaintiffs of just compensation by failing to provide owners with the "full monetary equivalent of the property taken." *Reynolds, supra*, 397 U.S. at 16.

III.

The district court exercised pendent jurisdiction over plaintiffs' state-law claims and held that the City violated state law in conducting its clearance projects by failing to

comply with two state statutes. *See* 363 F.Supp. at 1281-83. On appeal, the City challenges the exercise of pendent jurisdiction as well as the district court's disposition of the pendent state claims.

At the outset we reject as being without merit the City's claim that the exercise of pendent jurisdiction was improper. It is clear that plaintiffs raised a substantial federal claim and, therefore, the district court had power to hear pendent claims which "derive from a common nucleus of operative fact." *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966). In the present action, the state and federal claims have their origin in the City's conduct and make-up the underlying controversy between the parties. Accordingly, in the interest of judicial economy, convenience and fairness to the litigants, we hold that it was not an abuse of the district court's discretion to exercise jurisdiction over plaintiffs' pendent state claims. *See Aldinger* v. *Howard*, 427 U.S. 1, 14 (1976); *Gibbs*, *supra*, 383 U.S. at 726.

A.

As to the merits of the first pendent claim, the district court held that the City's failure to develop and implement a relocation program for persons displaced due to its clearance projects violated Michigan's Relocation Assistance for Displaced Persons Act, Mich. Comp. Laws Ann. §§ 213.321-213.332 (Supp. 1983) (Mich. Stat. Ann. §§ 8.215(61)-8.215(72) (Callaghan 1977)). This Act requires a State agency[7] to provide financial assistance, advisory services and reimbursement of certain expenses to persons displaced

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[7] The City of Dearborn is considered a "state agency" for purposes of this Act. *See* Mich. Comp. Laws Ann. § 213.321(d) (Supp. 1983) (Mich. Stat. Ann. § 8.215(61)(d)(Callaghan 1977)).

due to a governmental program requiring the acquisition of real property. The Act became effective on July 25, 1972.

The record shows that plaintiffs filed their complaint on October 14, 1971 and on March 22, 1972, the district court entered an order enjoining the City from acquiring property located in the South End and Eugene-Porath neighborhoods of Dearborn unless such acquisitions receive prior court approval. *Amen* v. *City of Dearborn*, No. 37242 (E.D. Mich. Mar. 22, 1972) (temporary restraining order). Consequently, any action on the part of the City prior to July 25, 1972 occurred before the Act's effective date. Nonetheless, the district court held that the City failed to comply with the Act and that its noncompliance constituted a continuing violation with respect to properties acquired with court approval on or after July 25, 1972.

Neither the language nor history of the Displaced Persons Act appear to require its application to individuals displaced prior to the Act's effective date. Therefore, given the absence of any authority mandating the retroactive application of the Act, we conclude that the district court erred to the extent that its ruling was based on the City's failure to assist those persons displaced prior to the effective date of the Displaced Persons Act.

B.

In addition, the district court held that the City violated the Rehabilitation of Blighted Areas Act, Mich. Comp. Laws Ann. §§ 125.71-125.84 (1976) (Mich. Stat. Ann. §§ 5.3501-5.3513(14) (Callaghan 1982)). This Act provides a city with additional statutory authority to adopt and implement plans for the rehabilitation of

blighted areas. The Act requires further that should a city proceed with redevelopment under this statutory authority, then it is required to appoint a citizens' district council with whom the city shall consult with and advise regarding all aspects of the redevelopment plan.

As found by the district court, the record shows that in March 1969 the Dearborn City Council passed an ordinance to proceed under the Rehabilitation Act and for the appointment of a citizens' district council. However, although a citizens' district council was appointed, only one meeting of the council was held and, thereafter, the terms of the members expired and no new appointments were made. In light of these facts, the district court held and plaintiffs contend on appeal, that the City is now compelled to proceed under the terms of the Act should it choose to continue its clearance programs. *See* 363 F.Supp. at 1283.

Although we agree with the district court that it appears that the City embarked on its redevelopment plan under the authority granted by the Rehabilitation Act, we disagree with that portion of the judgment which compels the City to proceed under the terms of the Act should it decide to continue its redevelopment projects. Section 13 of the Rehabilitation Act provides that the "powers granted in this act shall be in addition to powers granted to municipalities." Mich. Comp. Laws Ann. § 125.83 (1976) (Mich. Stat. Ann. § 5.3513 (Callaghan 1982)). Thus, the explicit language of the Act enables the City to proceed with redevelopment plans and, if necessary, purchase property under other statutory grants of power. Accordingly, since it is undisputed that the City of Dearborn does have other statutory grants of power to purchase property for

redevelopment purposes, it undoubtedly has the authority to proceed with its clearance plans without invoking the additional powers contained in the Rehabilitation Act. It is noted further that under § 12 of the Act the City may repeal or modify otherwise the March 1969 redevelopment ordinance, provided it complies with the appropriate legislative procedures and conducts future redevelopment and acqusitions pursuant to other applicable statutory authority. *See* Mich. Comp. Laws Ann. § 125.82 (1976) (Mich. Stat. Ann. § 5.3512 (Callaghan 1982)).

Accordingly, we hold that the district court erred in compelling the City to proceed under the Rehabilitation Act should it decide to continue its clearance projects. So long as the City satisfies legislative procedures in nullifying the prior redevelopment ordinance, it has the discretion to secure acquisitions pursuant to other applicable statutory powers.

IV.

Upon complying with this court's mandate and concluding that it had subject-matter jurisdiction, the district court reinstated its prior judgment and relief. The relief granted contains four primary features: (1) injunctive relief enjoining practices designed to force residents to sell their property; (2) injunctive relief compelling the City to divest itself of property it acquired without a stated public purpose; (3) a mandate requiring the City to comply with state statutory procedures in future acquisitions; and (4) the opportunity for those individual class members who sold their property to the City to establish any monetary loss from the sale. 363 F. Supp. at 1283-84. Additionally, the court ordered that should the City decide to proceed

with its clearance and redevelopment plans, the projects must be completed within a six-year period. *Id.* at 1284. On appeal, the City challenges the terms of relief and argues that the district court abused its discretion in formulating an appropriate remedy.

In light of our holdings concerning the public purpose requirement and pendent state claims, it is clear that those portions of the relief granted by the district court must be modified appropriately on remand.

On remand, the district court is authorized to hear additional evidence with respect to any monetary loss from sales to the City by any individual class member. It is ordered that the district court's injunction enjoining the City from engaging in practices designed to force residents to sell their property shall continue in effect, unless and until modified by the district court.

Accordingly, the judgment of the district court is affirmed in part and reversed in part and the case is remanded for proceedings consistent with this opinion. No cases are taxed. The parties will bear their own costs on this appeal.

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(May 17, 1972)

(Katherine Amen, et al, Plaintiffs v. City of Dearborn, et al, Defendants — Civil Action # 37242)

Plaintiffs seek to maintain a class action on behalf of the residents of their neighborhoods in the City of Dearborn, Michigan. This court must now determine whether this suit can be maintained as a class action.

This suit is brought under 42 U.S.C. 1983 and the Fourteenth Amendment. Jurisdiction is based upon 28 U.S.C. 1331 and 1343(3). Plaintiffs also assert pendent claims under Article I, § 17 of the Michigan Constitution and M.S.A. § 5.3501. Plaintiffs seek declaratory and injunctive relief in addition to damages.

The controversy in this case centers around activities of the defendant, City of Dearborn, and its agencies and employees in two areas of the City known as the Eugene-Porath area and as the South End. Plaintiffs contend that defendants have conspired to take and destroy property in these areas without following proper procedure and without provision for adequate compensation in violation of plaintiffs' right to due process. Plaintiffs also contend that defendants have entered upon a course of action, including threats and other tactics designed to force the sale of property in this area in violation of plaintiffs' rights.

The areas in question are well defined sections of the town being the only residential areas located between an

industrial belt and the city boundary with the City of Detroit. The area known as the South End is located along the South and East borders of the City and extends some twelve blocks to the north, and some six to eight blocks to the west. The Eugene-Porath area is the only other residential area in the industrial zone and is located a short distance north of the South End, being composed of two streets of two blocks each.

Six subclasses of plaintiffs have been proposed. The first consists of homeowners in the Eugene-Porath area. Three of the named plaintiffs, Doak, Skolmowski, and Kedziorek, purport to represent homeowners in that area. Two subclasses are composed of homeowners in the South End, one consisting of homeowners north of Lapeer Street in an area scheduled for clearance under the City Master Plan, and one consisting of homeowners south of Lapeer in an area scheduled for conservation. Named plaintiffs, Joseph and Helen Berri* purport in the Complaint to represent homeowners north of Lapeer. Katherine Amen and Charles Costa, who live south of Lapeer, represent homeowners there. The fourth subclass is composed of former homeowners in Eugene-Porath and the South End who have sold their property to the City. Fatima Kadoura purports to represent that class. The fifth class is composed of past and present tenants in the South End and Eugene-Porath areas. Alan Amen, Evelyn Tilley* and Joi Akers purport to represent these persons. The sixth subclass includes two neighborhood organizations, Southeast Dearborn Community Council and Eugene-Porath Community Association.

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* Helen Berri and Evelyn Tilley have asked to be removed from the suit. Plaintiffs have filed a motion to amend the complaint to eliminate these two parties.

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Thus, a party wishing to proceed with a class action must prove each of these elements set forth in subsection (a). See 3B J. Moore, *Federal Practice*, ¶ 23.02-2, p. 23-152. In addition, the party must fit within one of the subdivisions of 23(b). Plaintiffs claim to meet all of the requirements set forth in Rule 23(a) and 23(b) (1) (B) and 23 (b) (2). We will consider each requirement separately.

First, we must consider whether the class which plaintiffs seek to represent is so numerous as to make joinder impracticable. Defendants do not challenge plaintiffs' claim that some 5,000 to 6,000 people reside in these two areas. This number would encompass four of the subclasses designated by plaintiffs, i.e., the three classes of homeowners and the class of tenants. In addition, there is the fifth class of persons who have sold their homes to the City. Some of these persons may still reside within the South End and fall within other subclass. Others may have moved from the South End and increase the overall size of the class. Nevertheless, there is a substantial number of persons which plaintiffs claim to represent. Moreover, since the result of this suit will be to determine the propriety of the defendants' actions in this area, we cannot doubt that the rights of

these people will be substantially affected. Although defendants have pointed out that several named plaintiffs have withdrawn from the suit, the question of numerosity does not depend upon the willingness of the persons involved to be part of a suit, but whether persons whose rights will necessarily be affected are so numerous as to prevent joinder. Moreover, the mere showing that there are a few people who do not wish to be involved in the suit does not indicate the tenor of the entire community. Plaintiffs have met their burden with respect to the impracticability of joinder.

Secondly, plaintiffs must show that there are questions of law or fact common to the class they seek to represent. The facts which plaintiffs have alleged in their Complaint involve City activities directed toward the entire area. For example, plaintiffs cite activities of the City involving rezoning, issuance of building permits and occupancy permits, and enforcement of noise and traffic ordinances within these two areas. Insofar as these activities have violated the rights of any of the named plaintiffs, these activities have violated the rights of all residents in the area. To phrase it another way, if the rights of the residents asserted in the Complaint have been violated by the City's activities, these same facts showing non-enforcement of pollution ordinances, unnecessarily strict application of occupancy permits, etc., will be relevant to the case of each resident who could bring suit. Likewise, to the extent that former homeowners have sold their homes at unfair prices due to the same activities, common issues of fact exist. As to the class of associations, their position is considered below.

Questions of law are also common to members of the overall class and to members of each subclass. As to the three subclasses of homeowners, the questions of law will be the same. For example, each group must face the issues of whether the kinds of activities engaged in by the City are within its power and whether its activities have lowered the value of plaintiffs' property so as to constitute a taking of property without just compensation. Likewise, former homeowners in the South End and Eugene-Porath will look to the same questions of law to determine whether the City violated any of their righs to adequate compensation in the City's acquisition of their property.

The fifth subclass made up of tenants will confront issues of law similar to those issues to be raised by other subclasses to the extent of determining the validity of the City's actions. This subclass will confront different legal issues from the others insofar as their rights as tenants differ from the rights of property owners. But these issues will be common within the subclass. Therefore, there are sufficient common legal issues to make this subclass proper. Thus, we find that there are common issues of law and fact within each subclass and between the subclasses except for the associations, which we will discuss later.

The third requirement is that the claims of the representative parties are typical of the claims of the class. As pointed out by Professor Moore in 3A J. Moore *Federal Practice*, ¶ 23.06-2, this requirement can be equated with 23(a)(2). In *Mersay* v. *First Republic Corporation of America*, 43 F.R.D. 465, (S.D.N.Y. 1968), the allegation in plaintiff's complaint that the defendant had entered upon a common scheme directed at all members of the proffered class was sufficient to satisfy

this requirement. Likewise, in the case before this court, plaintiffs allege that defendants conspired to engage in activities that would destroy the areas in question. This allegation is sufficient to meet this requirement.

The fourth and most important requirement is that the representative plaintiffs will fairly and adequately protect the interests of the class. As pointed out by the court in *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555 (2d Cir. 1968), the court must look to insure that the party's attorneys are qualified and experienced and able to conduct the type of proposed litigation. Additionally, the court must insure that no collusive suit has been entered upon. *Eisen*, supra.

This court has no doubts as to the competency of plaintiffs' counsel to engage in this type of litigation. Moreover, we are convinced from the actions of the parties in this case that this is not a collusive suit.

In addition, both the *Eisen* court and Professor Moore indicate that adequate representation includes a finding of co-extensive interests between the representatives and the class. This requirement as pointed out in *Eisen* really is similar to the requirement that the claims of the representatives be typical of those of the remaining class. In the case before this court, all of the representatives of the class live within the areas in question or have lived in the area in question and have been affected in the same way as other residents in the South End and Eugene-Porath. Since this "effect" is the essence of the action, the interest of the representatives is co-extensive with the remaining class.

Another factor to be considered is the existence of any interest antagonistic to the interest of the class. Defendants have asserted in their response that there are

persons within the area who are opposed to some of the relief sought by the plaintiffs and who wish not to be a part of the suit. Judge Medina in the *Eisen* case pointed out that a representative must not necessarily show that the whole class considers his representation adequate. Moreover, Judge Medina said that silence by members of the class does not mean disapproval. The court further quoted from an article written by Judge Jack B. Weinstein in which the then Professor Weinstein said:

> A class action should not be denied merely because every member of the class might not be enthusiastic about enforcing his rights. . . . The court need concern itself only with whether those members who are parties are interested enough to be forceful advocates and with whether there is reason to believe that a substantial portion of the class would agree with their representatives were they given a choice. 391 F. 2d 563, fn. 7.

Defendants have brought to the attention of this court only two examples of persons, originally plaintiffs in this suit, who wish to be dropped as plaintiffs. This is not so substantial a number as would justify a conclusion that the class of some 6,000 individuals that plaintiffs seek to represent wish no part of this suit. Moreover, we are not convinced that these two individuals have indicated in the affidavits submitted to this court that plaintiffs have interests antagonistic to theirs. One of these individuals plans to sell her home to the City of Dearborn. Under these circumstances, it is not unlikely that she would wish to refrain from any lawsuit with the City which might prevent the sale of her home.

In addition, defendants assert that there are many persons who wish to sell their homes to the City in contradiction to the relief sought by the plaintiffs. There

are two reasons why this assertion should not defeat plaintiffs' bid for a class action. First of all the allegations of plaintiffs' Complaint are that the desire of persons to sell their homes to the City is a direct result of illegal or improper activities taken by the City. Under these circumstances such an assertion by the City cannot be a proper basis for denying plaintiffs the right to maintain a class action. Secondly, any real disagreement with plaintiffs over sales of property to the City goes only to the remedy sought in this action, and not to the substance of the suit. Plaintiffs may, for example, prevail on the merits but be afforded different relief than that which they have requested in their Complaint. Thus, we find that plaintiffs will be able to adequately represent the class they claim to represent.

In addition to meeting the requirements of 23(a), plaintiffs must also fall within one of the categories set forth in 23(b). The rule in pertinent part is as follows:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . .
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

Plaintiffs claim to meet both subsections (1)(B) and (2). Defendants did not direct any written response to these assertions.

Plaintiffs maintain that an adjudication of their rights in relationship to the alleged activities of the City would be conclusive of the rights of all members of the class. For example, if in a suit by one of the plaintiffs the court were to find that the activities of the City were proper and within their authority, any other resident suing the City for these activities would be met with the burden of refuting the precedent established by that case. The vice of this result, as pointed out by the Advisory Committee on the Federal Rules of Civil Procedure, is that the second plaintiff will have had no representation in the first suit which actually determined matters affecting him. By maintaining a class action, the court is aware of the rights of all plaintiffs and each potential plaintiff is thereby represented. This provision, of course, goes back to 23(a)(2) that requires there to be questions of law or fact common to the class. For the reasons stated here and for the reasons stated in that portion of this opinion dealing with 23(a)(2), we find that plaintiffs meet the requirement of 23(b)(1)(B).

Plaintiffs also maintain that their suit fits within 23(b)(2). Although having found their action to qualify under 23(b)(1)(B) no additional requirements need be met by the plaintiffs, we will consider this argument as an alternative basis for the maintenance of a class action. This particular section as set forth above is directed towards suits that seek declaratory or injunctive relief against the action or inaction of the defendant. The Advisory Committee on the rules said in its note to subdivision (b)(2) that

"Action or inaction is directed to a class within

> the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on groundswhich have general application to the class."

The Committee cited with approval the case of *Bailey* v. *Patterson*, 323 F. 2d 201 (5th Cir. 1963). In that case the plaintiffs were Negro citizens living in Jackson, Mississippi, who sought to enjoin the enforcement of state and municipal segregation laws and to enjoin authorities from continued harassment and intimidation of the plaintiffs. In that case the Court of Appeals held that the plaintiffs were entitled to injunctive relief not only for themselves but for all persons similarly situated. The court in that case said that they did not find it necessary to use the procedures under Rule 23 to fashion a judgment which would extend its benefits to others similarly situated to the plaintiffs although they recognized that Rule 23 could have been applicable. By placing the *Bailey* case in its advisory note, the Advisory Committee has indicated that this is the kind of result to which Rule 23(b)(2) should lead.

The case before this court is a similar kind of action having to do with activities of a governmental unit toward a group of its citizens. We find that this suit is the kind of action meant to be encompassed by Rule 23(b)(2).

Defendants have brought a case to our attention which they claim is analogous to the case before this court. In *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, (2d Cir. 1968), the plaintiffs challenged the manner in which the City of Norwalk and other defendants were conducting an urban renewal program. The district court denied the plaintiffs an opportunity to proceed as a class

action as defendants in the case at bar were quick to point out. However, the Court of Appeals reversed, finding that the individual plaintiffs could adequately represent the interests of the members of the class. We agree with defendants that this case is analogous to the situation before this court. We find the *Norwalk* case to be supportive of plaintiffs' motion and of our conclusion that plaintiffs can and should maintain a class action in the case before this court.

Plaintiffs having met the burden placed upon them in Rule 23 are entitled to maintain this suit as a class action.

Plaintiffs have named as parties two organizations whose membership includes residents of the South End and Eugene-Porath. These organizations desire to participate in this action as additional representatives of the class as designated in this suit. The question before this court is whether these two organizations have standing to sue and whether the members who are named parties fairly represent the association and its members. We have taken testimony on this matter at the hearing for determination of a class action. From this testimony it appears that the Eugene-Porath Community Association is an unincorporated association consisting of homeowners and tenants in the area. Mr. Doak, president of the Association and a named plaintiff, testified that his organization was formed in March of 1971 to oppose the City's plan to convert the Eugene-Porath community into an industrial area. Since that time this organization, which purports to represent some five hundred people in Eugene-Porath, has raised a substantial sum of money from its members and neighbors for the purpose of instituting suit against the City. It has also gathered signatures of some 130 persons residing and/or owning property in the area who are in

support of its activities. We find that this association does represent persons living in Eugene-Porath for purposes of this suit and does have standing to sue in their behalf. Cf. *National Motor Freight Traffic Ass'n.* v. *United States*, 372 U.S. 246 (1963); *Toilet Goods Ass'n, Inc.* v. *Celebrezze*, 235 F. Supp. 648 (S.D.N.Y., 1964).

Likewise, Alan Amen, president of the Southeast Dearborn Community Council and a named plaintiff, testified that his organization is made up of residents of the South End. The Council has met with the City on several occasions prior to the institution of this suit and has been accepted as the representative of persons in the South End. In addition the Council sends selected members to the City Planning Commission who represent the South End and act in an advisory capacity at the request of the mayor. Under these circumstances this organization clearly has standing to sue on behalf of the residents and property owners of the South End for purposes of this suit.

Moreover we find that individual plaintiffs in this action, for example, Mr. Doak, president of the Eugene-Porath Community Association and Alan Amen, president of the Southeast Dearborn Community Council, will adequately represent the association and its members as required in Rule 23.2.

The individual plaintiffs can adequately represent the proposed class, but we see no difficulty in allowing these organizations to join in this suit.

An appropriate order may be submitted.

/s/ Ralph M. Freeman
United States District Judge

Dated: May 17, 1972.
Detroit, Michigan

ORDER DESIGNATING AS CLASS ACTION

(United States District Court
Eastern District of Michigan
Southern Division)

(June 12, 1972)

(Katherine Amen, et al, Plaintiffs, v. City of Dearborn, et al, Defendants — Civil Action No. 37242)

This matter having come before the Court pursuant to Motion of Plaintiffs for Designation as Class Action, and the Court being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered that this action is designated as a class action pursuant to Federal Rule 23(b) (1) (B), and (b) (2).

The following subclasses, within the class are hereby designated:

1. Homeowners in the Eugene-Porath area represented by Plaintiffs Carl Doak, Barney Skomowski, and Leo Kedziorek.

2. Homeowners north of Lapeer Street in the South End represented by named Plaintiffs Joseph Chaidez and Helen Berri.

3. Homeowners south of Lapeer Street in the South End, represented by named Plaintiffs Charles Costa and Katherine Amen.

4. Former homeowners in the South End and Eugene-Porath areas who have sold their property to the City represented by named Plaintiff Fatima Kadoura.

5. Past and present tenants in the South End and Eugene-Porath areas, represented by named Plaintiffs Alan Amen, Evelyn Tilley and Joi Akers.

6. Neighborhood organizations, the South East Dearborn Community Council and the Eugene-Porath Community Association, additional representatives of the subclasses designated above.

/s/ Ralph M. Freeman
Chief United States District Judge

Approved as to form and substance

/s/ Elizabeth A. Tushnet
Center for Urban Law and Housing
Wayne County Neighborhood Legal Services
651 East Jefferson Avenue
Detroit, Michigan 48226
962-9015

/s/ Jospeh Burtell
Dearborn City Attorney
13615 Michigan Avenue
Dearborn, Michigan 48126

(Certification Omitted)

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(August 14, 1973)

(Katherine Amen, et al, Plaintiffs, v. City of Dearborn, a municipal corporation, et al, Defendants — Civil Action #37242)

This is a class action suit alleging violations of plaintiffs' rights under the Fifth and Fourteenth Amendments of the United States Constitution by the City of Dearborn, its officials and the Dearborn School Board. The plaintiffs are property owners, past and present, and other residents of two areas of Dearborn located generally in the southeast section of the City. They seek injunctive relief to stop certain clearance activities conducted by the city in the subject areas, claiming that these activities have constituted a taking without due process of law and have denied them equal protection. In addition, plaintiffs request that individual members of the classes be permitted to file damage claims against the City subsequent to a determination that equitable relief will be granted. For the reasons stated in this opinion, the court finds that the City and its officials have taken plaintiffs' property without due process of law. However, no violation of plaintiffs' rights to equal protection is found. The court also finds that the Dearborn School Board has not denied plaintiffs due process or equal protection.

The first area involved in this suit is known as the Eugene-Porath area. It is circumscribed by Michigan Avenue on the north, Wyoming street on the east, the Ford Expressway and its exit ramps on the south and west. The second area is known as the South End and is generally circumscribed by the Penn Central R.R. on the north, the Dearborn City limits on the east and south, and the Chesapeake & Ohio R.R. on the west. To the south of Eugene-Porath and to the west of the South End is located the Ford Motor Company Rouge Plant. A map of the South End is attached to this opinion for aid in understanding the discussion that follows.

The named plaintiffs in this case represent six subclasses as designated by order of this court dated June 12, 1972. Those subclasses are:

1. Homeowners in the Eugene-Porath area;
2. Homeowners north of Lapeer Street in the South End;
3. Homeowners south of Lapeer Street in the South End;
4. Former homeowners of the South End and Eugene-Porath areas;
5. Past and present tenants of the South End and Eugene-Porath areas;
6. Neighborhood associations, including the Southeast Dearborn Community Council and the Eugene-Porath Community Association.

Defendants, other than the School Board, requested that this court reconsider the designation of this case as a class action after hearing the evidence adduced at trial. However, no facts were brought out at the trial that

would change the opinion rendered on this matter. Thus the court reaffirms its opinion of May 17, 1972 and its subsequent order permitting this case to proceed as a class action.

The defendants include the City of Dearborn, various departments and divisions of the City, including the City Council, Orville Hubbard, the mayor, Simon Banda, Director of Housing, Mario Manarino, Director of Community Development, William Martin, Superintendent of Building and Safety, and John Nagy, City Planner, and others. The plaintiffs have also sued the Dearborn School Board. In this opinion we will refer to the City and all of its officials as "the City". This reference does not include the School Board which will be referred to separately.

Jurisdiction in this matter is based upon 28 U.S.C. §§ 1331 and 1343(3) and 42 U.S.C. § 1983, plaintiffs having alleged that they have been damaged individually in an amount in excess of $10,000 and that their constitutional rights have been violated. We note that since the trial of this case, the Supreme Court has made it clear that cities and municipalities are not subject to suit under § 1983 for either equitable relief or money damages. See *City of Kenosha, Wisconsin* v. *Bruno*, No. 72-658, decided June 11, 1973, 41 L.W. 4819; *Moor* v. *County of Alameda*, No. 72-10, decided May 14, 1973. Thus this court has no jurisdiction over the City itself under § 1983. However, this does not prevent individual City officials from being sued under § 1983, and the court would still have jurisdiction over the City under § 1331.[1]

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[1] For a discussion of the history and relationship of § 1331 and § 1343(3), see Cronander, *Lynch* v. *Household Finance Corp.*: Jurisdictional Ramifications, 24 Stanford L. Rev. 1134, (1972).

The only challenge to jurisdiction by the defendants was made by the City in its Answer to the First Amended Complaint in which it said, "Plaintiffs have failed to show that defendant, or its agents have acted under color of law." Clearly the City and its agents have been acting under color of state law which is the requirement of § 1983. Of course, the City is not liable under that section, but not for the reason stated in the answer. Moreover, the agents of the City are covered by the language of the statute. Therefore, we reject the only objection voiced by the defendants to this court's jurisdiction.

Several incidental matters should be clarified before discussing the facts of this case. Plaintiffs introduced the testimony of Dr. Barbara Aswad together with a survey conducted by her. This occasioned serious objections by the defendants as to the relevancy of the survey material. Because we are able to reach a result favorable to the plaintiffs without consideration of this testimony based upon the survey, we find it unnecessary to determine the admissibility of the survey evidence.

Secondly, the plaintiffs sought to introduce certain exhibits against the City which were admitted against the School Board. We find that the School Board and the City are separate legal entities and that documentation produced by the School Board would not necessarily be admissible against the City. Even though the School Board may have kept these documents at the command of certain statutes, nevertheless, we do not think that this makes them admissible against the City who had nothing to do with their preparation or the activity which precipitated their compilation.

We also note that the individual defendants, including the mayor, have never answered the Complaint in this matter and are technically in default. Answers have been filed on behalf of the School Board and the City alone. Nonetheless, the City Attorney for Dearborn has proceeded as though he represented all individual defendants and we will treat them as such even though he has never filed an appearance in this matter.

Turning now to the events in this case, we note that the Complaint was filed in July of 1971. The court subsequently granted plaintiffs' motion for a preliminary injunction on March 22, 1972 restraining defendants from acquiring any property in the affected areas until a decision on the merits could be reached. In the interim, the court held hearings on individual properties and permitted the City to buy houses where the owner expressed that particular hardship would occur unless the City were allowed to purchase the property. The City was also restrained from soliciting sales of property and destroying or rezoning property.

Trial was begun in this case February 6, 1973. From those proceedings and from various admissions and stipulations of the parties, the court makes the following findings of fact.

FINDINGS OF FACT

1. The City intends to clear the area of the South End north of Lapeer by purchase, to demolish all structures, and to rezone the area for industrial and business use. The City also intends to clear the Eugene-Porath area and to rezone it for industrial and business use.

2. The City undertook to complete this program of clearance through the following projects:

(a) the North Roulo Project, which was the only project funded by the federal government;

(b) the Ferney Street Project, the Tractor Street Project, and the Robert-Edsel-Marie Clearance Project, all of which were authorized by city ordinances, 5-517-68, 7-681-66 and 5-516-68, respectively, in which the City Council resolved that the areas or streets in question were slums, blighted, deteriorated and appropriate for clearance;

(c) the Akron-Holly Clearance Project and the Roulo-Amazon Urban Renewal Clearance Project, which were created by inclusion in the Capital Improvements Planning Program (CIPP) of 1968-1973, and the Salina Street Clearance Project, created by inclusion in the 1970-1974 CIPP.

3. Presently the City has three clearance projects:

(a) the Ferney Street Project, mentioned above;

(b) the Salina District Clearance Project, which includes all of the above projects requiring additional clearance; and

(c) the Eugene-Porath Clearance Project.

4. The Salina District Clearance Project and the Eugene-Porath Clearance Project were authorized only by their inclusion in the 1971-1975 CIPP.

5. There is no present announced plan or project of the City for the clearance of the South End south of Dix.

6. The City has never stated specifically from whence it derives its authority to carry out these projects. At one point the City Council passed ordinance 69-1626 which stated that the projects were being carried out under the Rehabilitation of Blighted Areas Act; however, the City

did not thereafter follow the procedures set forth in that Act. Although the City established the District Council provided for in the Act, the council met only once and the terms of the members expired without any reappointments.

7. The City also has a policy or program operating throughout the City to purchase and demolish garage-type homes, i.e. homes situated on the rear of the lot. The City has stated in its Answer to the Amended Complaint that this action is taken pursuant to M.S.A. 5.2891. This statute was repealed in 1968.

8. The City's Master Plan provided for the clearance of the South End north of Lowrey, and the clearance of Roulo and Amazon streets from Dix northward.

9. There was no notice to any of the people in these clearance areas that the City Council was contemplating discussion or approval or financing of these areas for clearance.

10. The City did send notice of its intent to clear the Tractor, Ferney, Robert, Edsel, and Marie streets after Council approval of the projects to the people of those areas.

11. The City has not used its power to condemn property in the South End or Eugene-Porath areas.

12. Dearborn has a very strict and all-encompassing building code.

13. In order to acquire property in the subject areas, the City through its agents including the defendants, has encouraged people to sell their property to the City. This court finds as a matter of fact that the following activities forced people to sell to the City. In part these activities extended to the area not scheduled for clearance as well as that area north of Dix scheduled for clearance and the Eugene-Porath area.

(a) In Eugene-Porath the City bought homes and cleared them for a tot lot even though a 10.9 acre park exists immediately adjacent to that area which itself is composed of only four blocks and 125 houses.

(b) The City has used its power to issue building permits, repair permits and occupancy permits to encourage people to move out by denying permits, verbally discouraging repairs, or causing unreasonable delay in the issuance of permits. The City also occasionally required complete remodeling of a house when a permit for only one kind of remodeling or repair was requested. Some persons in the subject areas also signed forms stating that any repairs permitted by the City would not be taken into account in computing the value of their homes should the City later acquire it. Although there was no direct evidence linking the City to these forms, we infer that only the City could be responsible for such forms that inured to its benefit alone.

(c) The City considers any building less than sixteen feet from the rear lot line to be substandard, regardless of the condition of the house.

(d) Dearborn is less active than most communities in the metropolitan area in working with its pollution problems, despite its power to do so under state law and city ordinances.

(e) Manarino, City Director of the Community Development Department, told people in the areas that the prices paid by the City for their properties would be going down or that there was a fixed maximum price for homes in the area.

(f) The City has required persons in the South End to perform maintenance and install items not required by the building code, including the installation of mechanical garbage disposal units under an ordinance

which does not compel mechanical disposals as the only method of garbage disposal. Thus, ordinance 63-1439 Sec. 4.6 provides:

> Every unit shall have adequate garbage disposal facilities or garbage storage containers, the type and location of which are approved by the superintendent.

(g) Many persons have solicited the court during the pendency of the temporary injunction asking that they be permitted to sell because among other reasons, they fear that they cannot comply with the Dearborn building code. This indicates the effect of activities of the City in denying permits or requiring excessive repairs.

(h) City-owned lots in the South End are often unsightly and unkept.

(i) The City contributed to pollution in the South End by selling property acquired in the North Roulo Project to Levy, a large processor of asphalt, and Mercier, a brick manufacturer, whose operation contribute significantly to pollution in the South End.

(j) The City has destroyed the private market throughout the South End and Eugene-Porath area by certain activities, including the following:

(1) City officials have informed residents or prospective buyers that there is no Federal Housing Association Insurance available in these areas:

(2) Recently, homeowners have had difficulty locating private buyers. Although part of this may be due to the aging character of the neighborhood, the Eugene-Porath area, for example, has experience a drop in sales which could only be attributed to the announcement of the clearance project;

(3) City officials have informed FHA and commercial lenders that part of the South End and all of the Eugene-Porath areas will be cleared for industrial use;

(4) The records of the Detroit FHA office indicate that no mortgage insurance is available for the South End north of Dix. Mortgage insurance for homes located in the remainder of the South End and the Eugene-Porath areas will be evaluated on a case-by-case basis;

(5) City-owned lots in the South End are not put back on the market; in other parts of the City, lots purchased by the City are sold if no public reuse is planned. The only lots sold by the City in the South End were purchased by industrial concerns;

(6) In at least one instance, the City discouraged a private purchaser and then bought the house itself.

(k) A city attorney, acting as attorney for an estate that owned property in the Eugene-Porath area, told the family that the City would purchase that property. He also told the family that it would be difficult to get an occupancy permit for the home because the City wanted to clear the area and consequently the inspectors would be very hard on the property in question.

(l) The City has held many meetings in the South End with residents and has told them repeatedly that the South End will be cleared, north of Lapeer or north of Lowrey.

(m) The City has made press releases stating that Eugene-Porath and parts of the South End will be cleared.

(n) The City has posted various signs throughout these areas which encourage people to sell to the City.

On occasion the City has posted lare signs which said, "Whoever wishes to sell to the City of Dearborn, call City Attorney," followed by a telephone number. The City has posted signs, "Sold to City of Dearborn" on property acquired by the City in these areas.

(o) The City has allowed property it has acquired to remain vacant and unprotected, to induce neighbors to sell. On some of these properties the City posted signs which stated, "Free at your risk, take any part of the house. First come, first served. Hurry." These signs precipitated stripping of the houses to the consternation of the neighborhood.

(p) The City bought the Roulo School and leased the yard area to Transport Pool, Inc. for the parking of full size semi-trailer trucks in violation of its own zoning ordinance 501.127.

(q) The City through its officials, including defendant Manarino, solicited sales of property in the subject areas. Quinn Smet, Director of Urban Renewal in the 1960's, said he spent one-half of his time soliciting sales of homes in the South End. This activity was extended into the Eugene-Porath area. As mentioned above, the City also posted large signs in the two areas which said, "Cash for your house. The City will pay a good fair price for any house in this block. See City Attorney, City Hall."

(r) If an owner in the South End made a request for a substantial repair permit in 1968, the City would offer to buy his house.

14. The City acquired 20 houses in the Eugene-Porath area between May of 1971 and February of 1973, keeping in mind that a temporary injunction issued March 22, 1972 prohibited all but court-approved acquisitions.

15. The City acquired property in the South End and Eugene-Porath areas as follows: Up until 1965, the City acquired 58 lots in the South End and 3 in Eugene-Porath. Between 1965 and 1969 the City acquired 159 lots in the South End and 9 in Eugene-Porath. Between 1969 and February 1973, the City acquired 109 lots in the South End and 18 lots in Eugene-Porath. These figures include acquisitions in the North Roulo Project. Presently the City owns 3/4 of the lots in the Tractor Street area; the majority of homes on Ferney Street; 40% of the homes on Robert, Edsel and Marie Streets; 26 lots on Salina from Eagle to Lapeer, and 36 lots on Salina from Dix to Lapeer.

16. The City has never enacted a relocation plan or provided funds for a relocation plan specifically for the clearance projects in the South End or Eugene Porath areas. It is clear from the testimony of Mr. Manarino, the City has not embarked upon even the most initial phases required by the Michigan Relocation Assistance for Displaced Persons Act, M.S.A. Sec. 8.215(61) et seq.

17. The City does have a relocation service that is available to anyone who walks off the street. This program has relocated four people from the South End and one from Eugene-Porath. However, this relocation program only provides information about available rental housing.

18. Eighteen people from both areas have been relocated in the City's senior citizens' housing.

19. Manarino and other City officials have helped various people to relocate on an ad hoc basis. Nevertheless, the City has not enacted any definite plan to care for persons displaced by the City's projects in these areas.

20. Contrary to plaintiffs' contention, the testimony showed that the level of city services in these two areas, such as recreation, garbage pick-up, street cleaning, library service, etc. is equal to that provided in the rest of Dearborn.

21. The City never suggested that an owner consult a third party about the value of property which the City sought to buy. The price offered by the City was often $5,000 less than the price the owner asked; sometimes the difference was even greater. This fact becomes significant when viewed in light of the method used by the City to determine the price it offered. Mr. Manarino, director of the Department of Community Development since 1969, stated that when he solicits sales in these areas, his offering price is based upon consideration of:

1) Comparable sales in the area;

2) The assessed value;

3) What the owner asks; and

4) What the owner paid for the property.

Quinn Smet, director of the Department of Urban Renewal from 1965 to 1969, stated that when he solicited sales in the South End, he determined his offering price by looking to:

1) The assessed value;

2) Comparables in the area and in East Dearborn; and

3) Condition of the house.

Smet went on to say that in 1968 the Mayor told him to use comparable property from the South End alone in computing value. Following this directive, Smet found

that he could not compute a high enough value to entice owners to sell. When he informed the Mayor of this fact, the Mayor put a moratorium on buying by the City, allowing ten or twelve options to buy held by the City to expire.

22. We find as a matter of fact that the effect of any clearance project such as that conducted by the City of Dearborn is to depress the value of property for the immediate future. Thus, the use of comparables from the area in computing the value of a home would result in a lower price.

23. Testimony of Charles E. Morley, Director of Wayne County Bureau of Taxation, indicates that Dearborn residential property has been assessed at the following percentage of true cash value over the last four years:

1972	17.8% of true cash value
1971	18%
1970	19%
1969	20.51%

Thus the use of the assessed value by the City in determining the value of homes could also contribute to computation of a low price.

24. The testimony also indicated that many of the people in the South End have owned their homes ten years or more. Thus the price they paid for their homes has little to do with present value. The City does not have a formula for computing the rise in market value of homes, taking into account inflation and other factors, over any period of time.

25. The City also offered testimony that it paid approximately $100 to $125 a front foot for lots in the South End and for garage homes regardless of the condition of the home.

26. Plaintiffs offered the testimony of a real estate appraiser as to the value of two homes, one located in Eugene-Porath and one located in the South End. He also made estimates of value of homes that have been bought and torn down by the City. These estimates were based upon photographs of the houses and statements of persons who had seen the properties. His appraisals or estimates were always significatly higher than the price paid or offered by the City. Nevertheless, because of the limited number of actual appraisals, we are unable to infer from this evidence that the City paid unfair or unreasonably low prices. We also note that an appraiser, called by the City as its witness, tended to contradict the testimony of plaintiffs' appraiser.

27. From these facts this court finds that the City has not been offering fair compensation to the home owners in the South End or in the Eugene-Porath areas from whom the City has acquired homes or to whom the City has made offers.

28. Census data introduced by plaintiffs shows that the South End and Eugene-Porath areas of the City of Dearborn have the lowest income per family, the highest number of families below the poverty level, the lowest median value for homes and the lowest value of median rent of any areas in the City.

29. Defendant School District is governed by a seven member Board of Education and is an entity entirely separate and distinct from the City of Dearborn. Hence, neither entity has any control over the operations of the other.

30. The School District sold the Roulo School property to the City for full consideration in 1962. Plaintiffs complain of certain activities by the City in connection with this property after its acquisition by the City, but there is no claim or proof of any improper action by the school district in making this sale.

31. In January 1969, the School Board adopted a plan whereby the seventh, eighth and ninth grades of Salina School (which at that time covered grades one through nine) would be gradually phased out, oneyear at a time, beginning with the seventh grade in the 1969-70 school year. The first phases of this plan was in fact implemented, with the seventh grade children being bussed to another school during the 1969-70 school year. However, in March 1970, after community protest and a series of meetings, the School Board rescinded this plan. The seventh grade was restored at Salina School for the 1970-71 school year, and the school basically continued to operate as before.

32. There is no evidence whatever that the School District was acting on the basis of any factor other than legitimate educational considerations in connection with the above described events. There is no evidence whatever of any conspiracy, plan or concert of action of any kind between the School District and the City in this regard or in any other respect.

33. Certain changes in some of the adult education classes and other special programs at Salina School were made, but in so doing there was no showing of discrimination or of any intent to aid the City in its clearance program.

CONCLUSIONS OF LAW

The plaintiffs contend that the actions delineated above constitute a taking of property without due process of law. The Fifth Amendment of the Constitution of the United States provides that no person shall be "deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." This amendment applies to the states, their agencies and their subdivisions through the Fourteenth Amendment. Plaintiffs contend that defendants' actions amount to a taking and that they have not provided fair opportunity for the determination of just compensation.

This court must first determine whether there has been a taking of private property under the facts of this case. The term "taking" implies the acquisition of property by the government without regard for the wishes of the owner. A taking can be accomplished by use of governmental powers of eminent domain or it can be accomplished by other kinds of governmental action. Thus in *Eyherabide* v. *United States*, 345 F. 2d 565. (Ct. Cl. 1965) the court held that the government had temporarily taken property belonging to the plaintiff for which he was entitled to compensation when the government had mistakenly considered plaintiff's farm to be a part of an adjacent naval gunnery range. The impact on plaintiff's property was devastating. Plaintiff was unable to hire a caretaker, shells were scattered over his land, improvements on the farm were destroyed, and the property was subjected to vandalism. Under these circumstances, the court found that a taking had occurred.

Likewise in *United States* v. *Kansas City Life Insurance Company*, 339 U.S. 799, (1950) the court found that there had been a taking of property where the government built a dam which permanently raised the water table of plaintiff's land to such an extent that he was unable to farm his land.

In *Matherson* v. *Long Island State Park Commission*, 442 F. 2d 566, (2d Cir. 1971) the plaintiff alleged that the Commission's police were preventing plaintiff's customers from entering the parking lot of plaintiff's establishment. The court, in reversing the dismissal by the lower court, said "It may well be that appellants can prove such harassment and interference as to amount to a deprivation of property without due process." Although that case has evidently not yet been decided on the merits, the comments of the circuit court indicate that harassment by a public body can constitute a taking of private property.

In *Madison Realty Company* v. *City of Detroit*, 315 F. Supp. 367, 371, (E.D. Mich. 1970) Judge Keith of this court held

> The totality of these acts by the Defendant City contributed to and accelerated the decline in value of plaintiff's property in 1962 so as to constitute a "taking" of that property within the meaning of the 5th Amendment to the United States Constitution.

The acts to which Judge Keith referred included denials of building permits, denial of a reassessment of the property for tax purposes, continued publication of plans for renewal of the area and denial of some city services.

In *Foster* v. *City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), aff'd 405 F. 2d 138, (6th Cir. 1968) Judge Kaess of

this court found that actions of the City constituted a taking of property before the actual condemnation of the property occurred. The City of Detroit in *Foster* had announced condemnation proceedings against an area which included the plaintiffs' property. Condemnation proceeded for approximately ten years during which time plaintiffs' property was not taken and plaintiffs were told not to make major improvements to their property because they would not be compensated therefore by the City. Plaintiffs' property became vandalized and not rentable due in part to the change in the neighborhood. Ultimately plaintiffs were forced to raze their buildings. Then after ten years the condemnation proceedings were discontinued only to be reinstated one year later. Plaintiffs' property was ultimately condemned and plaintiffs were compensated for the value of their now vacant lots. Judge Kaess noted in that opinion,

> Generally, the term "taking" is construed in its literal sense, that is, a taking occurs when the verdict is confirmed, the deed executed, and the award paid. There are, however, special situations where the actions of a governmental body are such as to amount to a taking of private property, regardless of whether there is an eminent domain proceeding, and in such situations, compensation is given for the taking when it occurs. *Supra*, p. 663.

The court went on to hold that "the actions of the defendant which substantially contributed to and accelerated the decline in value of plaintiffs' property constituted a 'taking' of plaintiffs' property within the meaning of the Fifth Amendment, for which just compensation must be paid." *Supra*, 665-666.

Lastly, we note the case of *Drakes Bay Land Company* v. *U.S.*, 424 F. 2d 574 (CT. Cl. 1970) in which the court found a taking although the government had not as yet condemned the land in question. In that case the National Park Service indicated to plaintiff that it intended to acquire plaintiff's land. Plaintiff then refrained from developing the land into a residential sub-division. Subsequently, plaintiff asked the government to pay for its land or exchange the land for other federal land. The government refused, although it was clear that the government intended to acquire the land on some date in the future. The court found that the plaintiff had been deprived of a private market to which he could have sold his land because of the threat of imminent condemnation. The court also found that the government had not acquired the land for ten years following its first discussion with plaintiff because they did not have funds to acquire all of the land surrounding plaintiff at one time and also because they knew and took advantage of the fact that plaintiff was hamstrung and could not dispose of his land except to the government. The court found such a situation to amount to a taking by the government.

Under these cases it is clear that activities other than actual condemnation can amount to a taking. There are many similarities between the case at bar and the *Foster* and *Madison Realty* cases. Although none of the activities of the City standing alone may have constituted a taking of plaintiffs' property, this court finds that the combination of the City's announcement and attendant publicity of the clearance projects, the City's refusal to issue certain repair and building permits coupled with its efforts to discourage repairs, the lack of care of City-owned property, the posting of signs on vacant buildings which invited vandalism, the posting of large

signs in the area offering to buy property, the solicitation of sales to the City, the City's lack of initiative to control pollution in the South End, and the gradual acquisition of properties in both areas resulted in the taking of property in these areas for which homeowners are entitled to just compensation.

Secondly, this court will look to the public purpose of these various clearance projects of the City. Under the law of Michigan, the City of Dearborn is permitted under M.S.A. 5.2078(2) to provide in its charter for

> acquisition by purchase, gift, condemnation, lease or otherwise of private property, . . . for any public use or purpose within the scope of its powers, whether herein specifically mentioned or not.

Thus the City of Dearborn, having admittedly adopted this provision in its charter, is limited to acquisitions of property for a public purpose. Plaintiffs ask us to determine whether or not the clearance projects have a public purpose.

The case law discussing the power of a court to review a determination of public purpose by other branches of the government is conflicting on the surface. Thus, in *Cincinnati* v. *Vester*, 281 U.S. 439, (1930) we have the Supreme Court saying that the determination of public purposes can be a judicial one. But in *Bragg* v. *Weaver*, 251 U.S. 57, (1919) the Court said that the necessity of a public taking is a matter of legislative concern. Likewise in *Berman* v. *Parker*, 348 U.S. 26, (1954) the Supreme Court said:

> We do not sit to determine whether a particular housing project is or is not desirable . . . It is within the power of the legislature to determine that the community should be beautiful as well as

> healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.

But as the Sixth Circuit pointed out in *U.S.* v. *Agee*, 322 F. 2d 139, (6th Cir. 1963) there is no case which holds that the courts cannot review a determination of public use at all. In that case the court held that the scope of judicial review in this area is very narrow, but that a court may nonetheless determine whether or not a determination of public use has been made in bad faith. In *Agee* the court affirmed the lower court's holding that the taking had not been in bad faith.

We note that the court has no power to go beyond a determination that the legislative body has acted in bad faith or in an arbitrary manner. For example, the court cannot change the boundaries of a particular project. *Woodland Market Realty Company* v. *City of Cleveland*, 426 F. 2d 955, (6th Cir. 1970).

In the case at bar there are at present three clearance plans, the Ferney Street Clearance Project, the Salina District Clearance Project, and the Eugene-Porath Clearance Project. The Ferney Street Clearance Project was authorized by Ordinance 5-517-68 in May of 1968, which stated that the area was a slum. This indicates at least a purpose for the propsed clearance which undoubtedly is within the power of the city, e.g. M.S.A. 5.3012. However, the only official action recognizing the Eugene-Porath project is its inclusion in the 1971-1975 and 1972-1976 CIPP. Nowhere in these documents is there any indication of the public purpose behind this project. The documents simply provide for clearance of the area for redevelopment of commercial and industrial use.

The Salina District Clearance Project was created in 1971 by transfers to it of the Tractor Street Clearance Project, the Robert-Edsel-Marie Clearance Project, part of the Salina Street Clearance Project plus all other areas of the South End north of Lapeer, including part of Roulo and Amazon Streets, and part of Wyoming, north of Lapeer. No specific purpose that could be deemed to be a public purpose is set forth in the CIPP in which the Salina District Clearance Project appears for the first time. The CIPP for 1971-1975 is the first and only official action designating this clearance project, except for subsequent CIPP. But even though no specific purpose is set forth for the Salina District Clearance Project (SDCP), the project is being carried out for a public purpose to the extent that it is made up of prior projects for which a public purpose was established. This would include, however, only Tractor Street and Robert, Edsel and Marie Streets. Ordinance 5-516-68 provided for clearance of Robert, Edsel and Marie Streets and ordinance 7-681-66 provided for clearance of Tractor Street. These ordinances as stated in the findings of fact also stated that the proposed clearance area were slums, blighted and deteriorated. We agree that such a finding would constitute a public purpose for clearing the area.

However, as to the remaining areas contained in the Salina District Clearance Project, we have been presented with no official action which sets forth any public purpose for their clearance. Again we are left with bare statements in the CIPP for the various years in which these areas were designated as Urban Renewal Areas etc., with no explanation of public purpose. Thus insofar as the SDCP encompasses Roulo, Amazon, Wyoming and Salina Streets north of Lapeer, acquisitions under this program are illegal in that no public purpose has ever been established.

The remaining program of the City involving the South End is called the Dix-Vernor Conservation Program. It is described in the CIPP as being a project for the "acquisition and removal of substandard structures, code enforcement and relocation housing in the area south of Lapeer." No particular public purpose is designated for this project which includes acquisition of homes in the area.

As noted heretofore the City under its charter only has power to acquire property for a public purpose. In the case of the Eugene-Porath area and parts of SDCP, no public purpose has been designated. Industrial and commercial use by itself does not constitute a public purpose. See *Berman*, supra. As to the Ferney Street Project it appears that the City has determined a public purpose for the clearance of this area. Since there was no evidence presented to the court as to the condition of this particular area we have no basis upon which to find that the determination of the City that this area was a slum was made in bad faith. The same is true for the Robert, Edsel, Marie and Tractor Projects incorporated into the SDCP.

As to the Dix-Vernor Conservation Area, the City has authorized the acquisition of substandard structures. This would qualify as a public purpose, but the city may only acquire homes for that purpose and no other.

Thus we find that City acquisitions under the Eugene-Porath Clearance Project and certain portions of the Salina District Clearance Project are illegal because the City has not, in accordance with its charter, determined the public purpose for these projects as provided in specific state statutes. Acquisitions under the Ferney Street Project, the old Tractor Street Project, and the former Robert, Edsel, Marie Project, however,

have been taken for a specified public purpose. As to the Dix-Vernor Conservation Project, acquisition can only be made as provided in the CIPP, namely, to acquire substandard homes.

We further note that it is City policy to acquire garage-type homes which situated less than 16 feet from the rear lot line. This policy results in the taking of private property, inasmuch as the City will not permit such homes to be sold or re-occupied, and has no public purpose which has been pointed out to the court. In fact the City purports to rely upon M.S.A. 5.2891 as their authority for acquiring garage-type homes, claiming that this state statute makes such housing illegal. (See defendants' answer to First Amended Complaint, p. 18, ¶ IV, A, 9(i).) However, this statute was repealed by the Michigan legislature in 1968. Thus defendant has no basis for its action and hence, no public purpose has been established. Thus, this court finds that purchases by the City of garage-type homes without regard to condition are illegal.

However, we find no requirement in the case law or in the Constitution for a hearing and notice of the hearing to people affected by a determination of public purpose. The Supreme Court said in *Bragg* v. *Weaver*, supra, at p. 58,

> Where the intended use is public, the necessity and expediency of the taking my be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment.

Although *Bragg* is not a case of recent vintage, we have found no case which casts any doubt on this language.

The cases cited by plaintiffs go to the point in time when such determination of necessity and expediency is converted into substantive action. Thus, in *Fuentes* v. *Shevin*, 407 U.S. 67, (1972) and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, (1969) the court did not hold that a hearing with notice should have been provided upon the enactment of the statutes in question, but that before they could be enforced so as to actually take away plaintiffs' property, they, the plaintiffs, would be entitled to a hearing and notice of the hearing on the proposed taking.

Thus we cannot go along with the suggestion of plaintiffs that they are entitled to notice of any hearing where a determination of a public purpose is to be made which may affect their property.

Thus far this court has determined that the City of Dearborn through its agents, including the defendants in this case except the School Board, has mounted a campaign in the South End and Eugene-Porath areas that constitutes a taking and that many of the sub-plans and clearance projects have been without a public purpose. However, the City Council has in some instances set forth a public purpose of sorts and may in the future determine a public purpose for the clearance of the other areas not yet so designatd. However, merely stating that certain activity constitutes a public purpose is not sufficient. See *City of Cincinnati* v. *Vester*, supra. Nevertheless, for those areas where the City has set forth a public purpose, and since we have found that a taking of private property has occurred throughout the South End and the Eugene-Porath areas, we will now determine whether the City of Dearborn through its agents has justly compensated those persons who have sold properties in these areas to the City.

We refer again to the case of *Bragg* v. *Weaver*, supra. Following the quotation set out above, the court went on to say at p. 59,

> But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard.

In other words, the concept of the condemnation jury or commission is mandated by the Constitution in the situation of a taking for public use. It is this concept of requiring an opportunity for the owner of property to be heard prior to a taking by the state or its agencies which is the basis of the recent decisions of *Fuentes*, supra, and *Sniadach*, supra. In those cases the Supreme Court held that wages could not be garnished without a prior hearing and that pre-judgment replevin without a prior hearing or notice violates the Fourteenth Amendment. The court said in *Fuentes*, at page 82,

> This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case" and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

In the case at bar the homes of individuals are involved. If the City takes property it must provide an opportunity for a hearing on the price it is to pay.

Plaintiffs also assert that defendants' activities have

resulted in a denial of equal protection because the clearance programs have only been instituted in the South End and Eugene-Porath areas which contain the lowest income families in the City. Plaintiffs introduced the 1960 and 1970 census data that clearly indicates the low economic status of the South End and Eugene-Porath areas.

Nonetheless, there was no indication on the trial of this case of any specific intent to discriminate against low income groups in Dearborn or to remove them from the boundaries of Dearborn. Nor were there the kinds of activities from which one could infer that such was the purpose of the City's activities. Moreover, we note that according to the projects of the City as they now stand, all of the South End south of Lapeer is to be conserved which is not consistent with an intent to drive out the low income families. In the case at bar some of the residents which the City is alleged to be driving out have relocated in the City, in private homes or in the Senior Citizen projects.

In *James* v. *Valtierra*, 402 U.S. 137, (1971) the Supreme Court refused to invalidate a California Constitutional Provision that provided that no low rent housing project could be developed in a community without approval of a majority of those voting in a community election. The court held that the mere fact that such a provision tends to fall on low income families did not violate the equal protection clause. See also *San Antonio Independent School District* v. *Rodriguez*, No. 71-1332, Decided Mar. 21, 1973.

In the cases relied upon by plaintiffs, the conduct of the authority was blatantly discrimatory. In *Kennedy Park Homes Association, Inc.* v. *City of Lackawanna*, 436 F. 2d 108 (2d Cir 1970) the City completely thwarted attempts to move the black population of the City outside of one

ward. Likewise, in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, (2d Cir. 1968) the court held that an allegation that whites were relocated more expeditiously than blacks in a City redevelopment constituted a claim of a violation of the Equal Protection clause of the Fourteenth Amendment. These cases involve the suspect classification of race. Our case alleges discrimination on the basis of wealth which is not a suspect classification. See *Rodriguez*, supra.

Thus we find the defendants have not violated the Equal Protection clause of the Fourteenth Amendment.

Plaintiffs have asserted two state claims in addition to the federal claims already discussed in this opinion. The court has no original jurisdiction over these claims, but the plaintiffs urge that we consider such claims under pendent jurisdiction. The City, of course, urges that these claims not be considered.

In the recent case of *Moor* v. *County of Alameda*, Case No. 72-10, decided May 14, 1973, the court agains affirmed the language in the case of *United Mine Workers* v. *Gibbs*, 383 U.S 715, 725 (1966). In *Gibbs*, the court said at page 725:

> Pendent jurisdiction, the sense of judicial *power* exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the Court. . . . The state and federal claims must derive from a common

> nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

The heart of this lawsuit is the manner in which the defendant City has conducted its clearance projects. Thus it seems proper and expeditious to consider those state provisions which defendant is accused of violating in connection with its program.

Plaintiffs first allege that the City is violating a Michigan Act entitled Relocation Assistance for Displaced Persons, P.A. 1972, No. 227, found at M.S.A. 8.215(61), et seq. This Act, which was effective June 1972, provides in section 2, M.S.A. 8.215(62)

> When a program is undertaken by a state agency which will require the acquisition of real property or its vacation by its occupants, the state agency shall provide a relocation assistance advisory services program for displaced persons offering the assistance provided by this act. If the state agency determines that a person occupying real property immediately adjacent to real property acquired under such program is caused substantial economic injury because of the acquisition, the person may be offered relocation assistance advisory services under this act.

The City and its program are clearly covered by this act. See § 8.215(61)(d). However, the City has not taken any steps to comply with this act although it had been in effect for six months at the time of trial. The City in its

post trial brief argues that the act is not applicable because of the temporary injunction issued by this court. However, the only purpose of the injunction was to hold the status quo pending determination of this case. It did not prevent the City from complying with state statutes especially since the City has shown no indication of abandoning its projects.

Secondly, the City has argued that it has complied by using a different method. As we read that act it provides the sole method which may be employed by the City. Therefore we find the failure to take steps to comply with the Relocation Act violates that act since it is clearly applicable.

In addition, the plaintiffs assert that the City has violated the Rehabilitation of Blighted Areas Act, P.A. 1945, No. 344, M.S.A. 5.3501, et seq, as amended. The problem comes about because on March 18, 1969, the City Council passed ordinance No. 69-1626, "An ordinance establishing a district area in compliance with Act 189, P.A. 1968, for the redevelopment of an area situate in the southeast part of the City of Dearborn, and providing for the appointment of a citizens' district council." The ordinance went on to state:

> Whereas: The City of Dearborn is engaged in a redevelopment program under provisions of Act 344, P.A. 1945, and
>
> Whereas: Act 189, P.A. being an amendment to Act 344, etc.

Thus it appears that the City began proceedings under the Blighted Areas Act. A District Council was appointed, as provided by the Act, but only one meeting of the Council was held in 1969. Thereafter the terms of the members were allowed to expire and no new

appointments were made. Moreover, the City took no other steps to comply with the Act. Since the City has never repealed this ordinance, it is in violation of its own ordinance by not proceeding under the Blighted Areas Act.

Thus the City is directed that should it choose to continue its clearance programs in compliance with other guidelines laid down in this opinion, it must conduct that clearance activity in compliance with the Blighted Areas Act.

While the thrust of plaintiffs' pleadings and proofs as they relate to defendant School District has never been altogether clear; it is apparent that plaintiffs claim basically that defendant School District has taken their property without due process of law and has denied them equal protection of the law in violation of the Fourteenth Amendment. The facts found above fail to support this claim insofar as it relates to the School District's actions when considered alone.

There is likewise no basis whatever for concluding that the School District violated plaintiffs' Fourteenth Amendment rights by acting in concert with defendant City in any way, or by "aiding" defendant City in its alleged unlawful scheme.

To summarize, we find that the defendant School Board has not violated any of the plaintiffs' rights. We find that the City through certain defendants named in the complaint has violated plaintiffs' rights to due process under the Fourteenth and Fifth Amendments. We also find that the City has not violated plaintiffs' right to equal protection under the Fourteenth Amendment. As to the state claims raised in this suit, we find the City to be acting in violation of the

Rehabilitation of Blighted Areas Act and the Relocation of Displaced Persons Act.

RELIEF

The defendants, Manarino, Martin, Nagy, Banda, Hubbard and the Dearborn City Council and their successors will be enjoined from engaging in the following activities:

1. Soliciting or acquiring by purchase any property in the Eugene-Porath and South End areas, except as hereinafter provided.

(a) The City may acquire substandard properties. A substandard structure shall be defined specifically in the judgment to be entered in this case.

(b) The City may acquire homes on Tractor, Ferney, Robert, Edsel and Marie streets since we have found that the City has established a public purpose. However, acquisitions in these areas may only be made by condemnation. In addition, any acquisitions in these areas must comply with the Blighted Areas Act and the Relocation of Displaced Persons Act.

(c) The City may make purchases heretofore agreed to by the parties after presentation to and upon order of the court.

2. Refusing any certificate of occupancy for any property now standing in the South End and Eugene-Porath areas for its present or most recent use unless the structure is substandard.

3. Denying repair or building permits for the South End and Eugene-Porath areas unless the denial is expressly required by law and also discouraging repairs in these areas.

4. Requiring homeowners to make the repairs themselves.

5. Requiring any statement from the owner that the City will not pay for the increase in value caused by the repair should the City thereafter acquire the property.

6. Interfering with the granting of mortgage money or issuance of mortgage insurance.

7. Placing signs on City-owned property in these areas which would permit salvaging of material contained in the structure.

8. Posting signs soliciting sales of property in these areas to the City, nor shall any sign be placed on property bought by the City announcing their acquisition of that property.

9. Publicizing plans to clear these areas.

10. Acquiring property in the Eugene-Porath area for park lands or tot lots.

11. Changing the zoning of any area located within the Eugene-Porath or South End areas for five (5) years.

Should the City desire to continue the clearance and conservation plans for the South End and Eugene-Porath areas in accordance with this opinion, such projects shall be structured so as to complete clearance within a six-year period.

Individual members of the class who have sold property to the City under the clearance programs for the South End and Eugene-Porath areas may file individual claims against the City for the difference between the price paid by the City and the price later determined to be the fair market value of the property at the time of the taking of the property, such claims to be submitted within forty-five (45) days following the date of filing the judgment in this case. Appropriate notice shall be given to members of the class affected by this provision. Such claims will be referred to a master to review the facts in each case, determine a date of taking in line with this opinion, take testimony and make a determination of value. Should it be found that the City paid less than the value determined by the master to be the fair market value of the property, the City shall reimburse the owner that amount plus interest at the rate of 5% per annum from the date of the purchase. Should it be found that the City paid just compensation, claimant shall pay costs of the proceeding.

Property in the subject areas presently owned by the City, except property located on Tractor, Ferney, Robert, Edsel and Marie streets, shall be placed on the market by listing it with a real estate broker or by other means to be set forth in the judgment, and shall be maintained as hereinafter set forth.

(a) Structures which are presently vacant shall be boarded up or otherwise protected from fire and vandalism.

(b) Structures which are substandard are to be demolished within sixty (60) days of acquisition or the entry of judgment, whichever shall be the longer.

(c) Vacant property shall be properly maintained.

(d) As to property owned by the City on Tractor, Ferney, Robert, Edsel and Marie streets, the City shall properly maintain vacant lots and demolish or protect vacant structures. The City may sell these properties.

The City is hereby ordered to proceed according to the Relocation of Displaced Persons Act should it decide to continue its clearance program by otherwise complying with this opinion.

The City of Dearborn will not be prohibited from proceeding under any Michigan statute which authorizes clearance or conservation programs so long as the City follows the complete statutory proceedings.

A proposed form of judgment shall be submitted by plaintiffs in accordance with the foregoing relief provisions, which may include other relief provisions not inconsistent with this opinion.

/s/ Ralph M. Freeman
United States District Judge

Dated: August 14, 1973.

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(December 11, 1973)

(Katherine Amen, et al, Plaintiffs v City of Dearborn, a municipal corporation, et al, Defendants — Civil Action No. 37242)

This matter having come before the Court for trial in February, 1983, and the Court having found, in an Opinion filed August 14, 1973, that Defendant City of Dearborn, officials Mario Manarino, William Martin, John Nagy, Simon Banda, Orville Hubbard, the Dearborn City Council, and the Dearborn City Plan Commission have taken Plaintiffs'* property without due process of law and in violation of state statutes, the Court finds that the following provisions of this Judgment are individually and collectively necessary to remedy the unlawful actions of Defendants. Therefore,

It Is Hereby Ordered:

The Defendant City officials Mario Manarino, William Martin, John Nagy, Simon Banda, Orville Hubbard, the Dearborn City Council, and the Dearborn City Plan Commission, and their successors, hereinafter referred to as "the City," will be enjoined from engaging in the following activities in relation to the South End and Eugene-Porath area.

1. Soliciting or acquiring by purchase any property in the South-Porath areas, except:

a. The City may acquire substandard properties, as defined in the Appendix hereto. The City may not acquire structures under any Dearborn ordinance unless said structures are also substandard as defined herein.

The City shall notify Plaintiffs' counsel in writing of any structures presently owned by the City or which at a later date the City proposes to acquire which are deemed substandard by the City or for which the City proposes to deny occupancy permits. Such notice shall include the inspection reports, cost estimates, appraisals, and any other information relied on by the City to establish that the structure meets the criteria set forth in the Appendix hereto as a substandard structure. The Court shall retain jurisdiction to decide any disputes between Plaintiffs and the City, such decision to be based on the above information, Plaintiffs' written response thereto, and any further information the Court may deem necessary.

b. On Tractor, Ferney (within the Ferney Project), Robert, Edsel, and Marie Streets, the City may also acquire standard properties in accordance with this Judgment.

c. No acquisitions may be made until institution of condemnation proceedings. Such proceedings may not begin until there is full compliance with the appropriate sections of the Michigan Blighted Areas Act (MCLA § 125.71) and the Michigan Relocation of Displaced Persons Act (MCLA § 213.321), as set forth below under "State Acts." All persons residing in dwellings that the City wishes to acquire shall be provided with Notice 1, set forth in the Appendix to this Judgment, subsequent to the initiation of condemnation procedures.

2. Refusing any certificate of occupancy for any property now standing in the South End and

Eugene-Porath areas for its present or most recent use or a use consistent with present zoning unless the structure is substandard as defined herein.

3. Denying repair or building permits or licenses for commercial or residential uses and buildings in the South End and Eugene-Porath areas unless the reason for denial is set forth in writing and the denial is expressly required by law. The City may not require repair or remodeling work other than that for which a permit is requested as a condition of obtaining the requested permit.

4. Discouraging repairs in the South End or Eugene-Porath areas.

5. Requiring repairs to be performed in a manner or with materials that are not required by applicable Michigan law or Dearborn ordinance.

6. Discouraging the filing of applications for repair or building permits or licenses in the South End or Eugene-Porath areas, or delaying the processing of same. Failure of the appropriate department to take action on any application within thirty (30) days of filing shall give the party aggrieved thereby an immediate right of appeal to the appropriate appeals board.

7. Requiring homeowners to make desired repairs themselves, requiring the repairs to be made by contractors, or discouraging homeowners or contractors from contracting for repair work.

8. Requiring any statement from a property owner that the City will not pay for the increase in value caused by repairs or improvements should the City thereafter acquire the property.

9. Interfering with the granting of mortgage money

or issuance of mortgage insurance. Notice as set forth in the Appendix to this Judgment (Notice 2) shall be sent by Defendants to the banks, mortgage companies, and insuring agencies set forth in the list accompanying Notice 2 in the Appendix. The Defendants shall not represent that areas are planned or considered for clearance unless a project complying in all respects with this Judgment and the Opinion filed in this cause has entered the stage where standard property may be acquired. The City is not barred from having a master plan as required by state law, or from any publicity required by state law.

10. Placing signs on City-owned property in these areas which would permit salvaging of material contained in the structure. The Defendants shall post a notice on each vacant building stating that trespassing and removal of material from the building are illegal and will be prosecuted.

11. Posting signs soliciting sales of property in these areas to the City, nor shall any sign be placed on property bought by the City announcing their acquisition of that property.

12. The City shall not publicize clearance plans except in compliance with the Blighted Areas Act. The City shall not represent that any acquisition shall take place except in compliance with this Judgment.

13. Acquiring property for park lands or tot lots. If the City desires to add to Canterbury Park and can show by referendum of the residents South of Dix that they desire expansion of the park, the City may do so.

14. Changing the zoning of any area located within the South End or Eugene-Porath areas for five (5) years from the entry of Judgment.

15. Selling or leasing City-owned property in the affected areas to any industrial, warehousing, trucking, or similar concern unless the zoning would permit such use. No land shall be sold or leased for heavy industrial use.

16. Failing to enforce all City ordinances relative to pollution control and trucking on residential streets.

Defendants shall supply all department heads with a copy of the Judgment; department heads are responsible for informing all employees of relevant provisions of the Judgment.

DAMAGES

Individual members of the class whose property has been acquired by the City in the South End and Eugene-Porath areas may file individual claims against the City for the difference between the price paid by the City and the price later determined to be the fair market value of the property, taking into account the effect on value caused by the City's activities in the area prior to purchase. Plaintiffs' attorneys, the Center for Urban Law and Housing, shall not suggest or refer any such persons to any particular attorney.

Such claims are to be submitted within forty-five (45) days following the date of Judgment in this case or notice, whichever is later. Notice shall be given to members of the class affected as follows:

1. Defendants shall prepare a list of the names and last known addresses of those who have sold property to the City in the affected areas by making use of all pertinent public and private records and directories which are reasonably available to the City. Plaintiffs

shall review the list and correct addresses to the best of their knowledge.

2. Upon receipt of the list with corrected addresses from Plaintiffs, Defendants shall:

a. Mail by certified letter copies of Notice 3 with return receipt requested to all names on the list. As corrected addresses are made known to the City, notice shall be mailed to these addresses. Defendants shall supply Plaintiffs' attorneys copies of all returned receipts.

b. Place one-quarter page advertisements for two (2) weeks in each of the Dearborn papers with Notice 4, and shall also place the information from Notice 4 on signs in the affected areas.

3. The City shall then place advertisements in the Dearborn papers to run for two (2) weeks, containing Notice 4 and giving the names of and last known addresses of those whose correct addresses are being sought, with the request that correct addresses be supplied the City. Thirty (30) days after publication of the second advertisement, the City shall send by registered mail copies of Notice 3 as in Step 2a above to these addresses, and concurrently the City shall publish Notice 3 in the Dearborn papers for one week. Publication will be considered notice for those who were not reached by mailing. No claims may be filed later than sixty (60) days subsequent to publication of Notice 3.

Damage claims shall be referred to a master who shall review the facts in each case in an adversary proceeding. In such an action, it shall be a complete defense for the City to show that notice as provided above was secured more than forty-five (45) days prior to filing of the claim.

The City shall provide upon request to counsel for each claimant all information in the possession of the City which may facilitate the determination of fair market value.

Should it be found in a timely action that the City paid less than the value determined by the master to be the fair market value of the property, the City shall reimburse the owner that amount plus interest at the rate of Five (5%) Percent per annum from the date of the purchase. The losing party shall pay costs in any such proceedings.

MAINTENANCE AND SALE OF PROPERTIES OTHER THAN TRACTOR, FERNEY, ROBERT, EDSEL, AND MARIE

City-owned properties in the subject areas other than Tractor, Ferney (within the Ferney Project), Robert, Edsel, and Marie Streets shall be maintained and offered for sale as follows:

1. All unoccupied structures shall be boarded up, locked, and otherwise supervised so that they are protected from fire and vandalism, and so that they are not a danger to the surrounding residents.

2. Structures which are substandard within the definition in the Appendix hereto are to be demolished within sixty (60) days of acquisition or entry of Judgment, whatever is later. The resultant vacant lots must immediately be offered for sale in accordance with Paragraphs 5, 6, and 7 below.

3. City-owned vacant lots and the grounds surrounding unoccupied City-owned structures shall be properly maintained; such maintenance shall include trimming of grass and weeds and prompt removal of trash and debris.

4. No plumbing or other fixtures are to be removed from standard or substandard structures except at the time of demolition.

5. All City-owned properties, except those on which there are standing substandard structures, shall be placed on the market within four (4) months of the entry of this Judgment by:

a) Listing with a real estate brokers(s).

b) Placing a sign on each parcel indicating that said property is offered for sale by the City pursuant to court order, and indicating the name, telephone number, and address of the broker.

c) The broker shall place advertisements each week for at least four (4) consecutive weeks in at least one of the Dearborn newspapers and for at least one week in one of the two major Detroit newspapers indicating that the property is offered for sale by the City pursuant to court order (with sale price specified).

6. The price at which the properties are to be offered for sale shall be determined to be no more than:

a) For improved lots, the price shall be the cost to the City, with said cost lowered or raised in proportion to the deterioration or improvement to the property since acquisition. This price may be adjusted upward at the rate of Five (5%) Percent per year since acquisition.

b) For vacant lots, either Five Hundred ($500.00) Dollars per 30-foot-wide lot or the median price paid by the City for vacant lots in the affected areas in the last five (5) years. The City has the burden of proving within ninety (90) days of entry of Judgment any median price higher than Five Hundred ($500.00) Dollars.

c) If more than one offer to purchase for the listed price is received within thirty (30) days of the public offer of sale, there shall be a public blind draw, and the winner's purchase offer shall then be accepted. However, for vacant lots, the adjacent lot owners have preference.

d) For all such properties left unsold within six (6) months of first offer of sale, the offered price shall be reduced Twenty (20%) Percent then and Twenty (20%) Percent each six (6) months thereafter until sold. However, at the end of any six (6) month period, such unsold property may instead be sold to the highest bidder at public auction, for which public notice is given thirty (30) days in advance.

The City shall either acquire forthwith all substandard vacant structures open to trespass not owned by the City, or shall take appropriate action under state law against the owners of such property, to remove or make secure from trespass all such structures. If acquired by the City, such structures shall be demolished in accordance with Paragraph 2 above, and the resultant vacant lots offered for sale in accordance with Paragraphs 5, 6, and 7 above.

TRACTOR, FERNEY, AND REM

City-owned properties on Tractor, Ferney (within the Ferney Project), Robert, Edsel, and Marie Streets shall be maintained or demolished as in Paragraphs 1, 2, and 3 above, except that vacant lots are not required to be sold. The City may sell any properties it owns in these areas.

STATE ACTS

The City is hereby ordered to proceed according to the Michigan Relocation of Displaced Persons Act and Blighted Areas Act should it decide to continue its

clearance program by otherwise complying with this judgment. The City of Dearborn will not be prohibited from proceeding under any Michigan statute which authorizes clearance or conservation programs so long as the City follows the complete statutory proceedings.

If the City desires to proceed with clearance or conservation programs that necessitate purchase of real property, the City shall make an affirmative showing or compliance with the Relocation of Displaced Persons Act and the Blighted Areas Act prior to making purchases in the area affected. Should the City desire to continue the clearance and conservation plans for the South End and Eugene-Porath areas in accordance with this Judgment, such projects shall be structured so as to complete clearance within a six (6) year period.

This Court shall retain jurisdiction over this matter for the entry of such further orders as may be appropriate to effectuate the provisions of this Judgment.

Costs shall be taxed against the City.

It Is Further Ordered that Plaintiffs' action against the Dearborn Board of Education is hereby dismissed for the reason given in the Opinion of August 14, 1973.

/s/ Ralph M. Freeman
District Judge

Dated: December 11, 1973

Approved By:

/s/ Joseph Burtell
Attorney for City of Dearborn Defendants

/s/ James E. Tobin
Attorney for Dearborn School Board Defendants

Center for Urban Law & Housing
Attorneys for Plaintiffs

APPENDIX

SUBSTANDARD DWELLINGS

A structure shall be deemed substandard if it contains major structural failures in the foundation, exterior walls, roof structure, or main superstructure, or if the structure evidences a lack of maintenance for such a length of time that: 1) it cannot be repaired so as to comply with the Dearborn Housing Code (Ordinance No. 63-1439) for a cost of less than 50% of the value of the structure when repaired, and 2) the fair market value of the structure is less than 60% of the average fair market value of structures in the same class on the same block.

For purposes of (2) above: Fair market value shall be determined per square foot of living space. All structures are to be placed in one of the following classes: a) single family dwelling; b) single family set-back or "temporary" dwelling; c) two (or more) family dwelling; d) commercial property; e) mixed commercial-residential property. Further, a block shall be defined as both sides of a street proceeding in a north-south direction and between two consecutive east-west streets. If there are no structures in the same class on the same block as the structure in question, the structure shall be compared to structures of the same class on the adjacent blocks to the north and south.

NOTICE 1

(Name and Address of
Property Owner)

Dear ____:

The City of Dearborn has instituted condemnation proceedings against your property under the statutes of

Michigan because the City has declared clearance of your area [or removal of your substandard home] to be a public purpose.

Under these statutes you have certain important rights.

By law the City's petition for condemnation must ask that a jury be summoned to determine:

(1) Whether the proposed public use is necessary.

(2) Whether taking your property is necessary for the proposed public use, and

(3) What the just compensation should be.

You have the right to be notified of hearing on your case, to present evidence for your side (including showing what you think your property is worth or was worth before the City's clearance programs affected its value), and to be represented by an attorney.

If your property is to be sold to the City you have a right to have a jury, and not the City, determine the fair value of your property.

Very truly yours,

Joseph Burtell
City Attorney

NOTICE 2

Dear Mortgage Lender or Insurer:

The City of Dearborn is *not* conducting any clearance or urban renewal activities in the residential areas of Dearborn south of Michigan Avenue and east of the Ford Rouge Plant (the area popularly known as Eugene-Porath

and the South End). Any information to the contrary, received from any source, is incorrect and disavowed by the City of Dearborn.

I thank you for your attention.

Very truly yours,

Joseph Burtell*
Dearborn City Attorney

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* Notice may be from Mario Manarino or Orville Hubbard if preferred by Defendants.

LENDING INSTITUTIONS TO WHOM NOTICE 2 IS TO BE SENT

BANKS

Bank of Dearborn, 23400 Michigan Avenue, Dearborn, MI; Bank of the Commonwealth, West Fort & Griswold, Detroit, MI 48226; City National Bank, City National Bldg., Detroit, MI 48226; Detroit Bank & Trust, West Fort & Washington Blvd., Detroit, MI 48226; Greenfield National Bank, 25001 Michigan Avenue, Dearborn, MI; Manufacturers National Bank of Detroit, 151 West Fort Street, Detroit, MI 48226; Merchants Bank of Detroit, 15544 West McNichols, Detroit, MI; Michigan National Bank of Detroit, 500 Griswold, Detroit, MI 48226; National Bank of Detroit, Detroit, MI 48232; National Bank Wyandotte-Taylor, 23455 Eureka, Taylor, MI; River Rouge Savings Bank, 10474 West Jefferson, River Rouge, MI 48218; Security Bank & Trust, 16333 Trenton Rd., Southgate, MI; Wyandotte Savings Bank, 3005 Biddle, Wyandotte, MI.

SAVINGS & LOAN ASSOCIATIONS

American Savings Assoc., 24700 Northwestern Hwy., Southfield, MI 48075; Dearborn Federal Savings & Loan, 22315 Michigan Avenue, Dearborn, MI; Detroit Federal Savings & Loan, 511 Woodward, Detroit, MI 48226; Detroit & Northern Savings & Loan Assoc., 1133 Griswold, Detroit, MI 48226; Down River Federal Savings & Loan Assoc., 20600 Eureka, Taylor, MI; First Federal Savings Assoc. of Dearborn, 23550 Ford Rd., Dearborn, MI; First Federal Savings of Detroit, 1001 Woodward Avenue, Detroit, MI 48226; Guaranty Federal Savings & Loan, 2211 Fort, Wyandotte, MI; Home Federal Savings & Loan, 9108 Woodward Avenue, Detroit, MI; Metropolitan Savings Assoc. Northwestern Hwy at Middlebelt, Farmington, MI; Peoples Federal Savings & Loan, 751 Griswold, Detroit, MI 48226; Standard Federal Savings & Loan, 2401 W. Big Beaver, Troy, MI; Surety Federal Savings & Loan, 1250 Griswold, Detroit, MI 48226.

MORTGAGE COMPANIES

John Adams Mortgage Co., 19042 West McNichols, Detroit, MI; Advance Mortgage Corp., 1107 First National Building, Detroit, MI 48226; Altype Mortgage Service Co., Inc., 20131 James Couzens, Detroit, MI; Aetna Mortgage Co., 24469 Greenfield, Southfield, MI 48075; Auer Mortgage Company, 23880 Woodward, Pleasant Ridge, MI; Capital Mortgage Corp., 26600 Telegraph, Southfield, MI 48075; Citizens Mortgage Corp., 24700 Northwestern Hwy., Southfield, MI 48075; Continental Acceptance Corp. 22215 West Warren, Dearborn Heights, MI; Elmwood Mortgage Co., 22735 Michigan Avenue, Dearborn, MI; Griswold Mortage Co. 220 Ford Building, Detroit, MI 48226; Michigan Mortgage Corp., 139 Cadillac Square, Detroit, MI 48226; Mid-States

Mortgage Corp., 1521 First National Bldg., Detroit, MI 48226; North American Acceptance Corp., 24910 Northwestern Hwy., Southfield, MI 48075.

MORTGAGE INSURERS

Federal Housing Admin., First National Building, Detroit, MI 48226; Veterans Administration, 801 West Baltimore, Detroit, MI.

NOTICE 3

To Former Property Owners in the
South End and Eugene-Porath Areas

Since you sold property (house, business building, or vacant land) to the City of Dearborn after 1965, you may have a claim for money damages from the City. In a recent federal case, *Amen* v. *Dearborn*, the court decided that the City has not been paying full value to homeowners from the South End and Eugene-Porath areas who sold to the City. *However, such clams must be filed in federal court in Detroit within Forty-Five (45) Days of receipt of this notice*, or they will be invalid.

Claims for money against the City will be given to a master who will determine fair price. Both sides will have the opportunity of presenting evidence. If you can prove your property was worth more than the City paid, you will collect the difference plus interest. If you cannot, you must pay the cost of the proceeding.

You may talk to an attorney to see what your rights to compensation are. You may contact the attorneys who represented the residents of the South End and Eugene-Porath areas in the *Amen* v. *Dearborn* case. Their address and phone number are:

Center for Urban Law and Housing
651 East Jefferson Avenue
Detroit, Michigan 48226
(313) 962-9015

A full copy of the federal court's Opinion and Judgment can be read at the Henry Ford Centennial Library, the City Hall Branch Library, and the Salina Reading Room (2121 Salina Street).

This action in *Amen* v. *Dearborn* was a class action, and partially determined your rights as seller. If you do not bring a damage action within Forty-Five (45) Days of this notice, you may not do so later.

Very truly yours,

Joseph Burtell*
Dearborn City Attorney

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* Notice may be from Mario Manarino or Orville Hubbard if preferred by Defendants.

NOTICE 4

NOTICE TO FORMER PROPERTY OWNERS IN THE SOUTH END AND EUGENE-PORATH AREAS FROM THE CITY OF DEARBORN

If you sold property (house, business building, or vacant land) to the City of Dearborn after 1965, you may have a claim for money damages from the City. In a recent federal case, *Amen* v. *Dearborn*, the court decided that the City has not been paying full value to homeowners from the South End and Eugene-Porath areas who sold to the City.

The City of Dearborn is compiling a list of names and addresses of those who sold to the City so that they might be notified of their right to seek money damages. If you were a seller or you know of such a seller, please contact the City Hall, phone _____, with the correct current address.

OPINION

(United States Court of Appeals — Sixth Circuit)

(Argued April 17, 1975)
(Decided March 24, 1976)

(Katherine Amen, et al, Plaintiffs-Appellees, v. City of Dearborn, a Municipal Corp., et al., Defendants-Appellants — No. 74-1650)

Before: Peck, McCree and Engel, Circuit Judges.

John W. Peck, Circuit Judge.

Plaintiffs-appellees filed the instant complaint in district court claiming that their properties in an urban renewal area, had been "taken" without just compensation. Named defendants were the City of Dearborn, its mayor and city council, its plan commission and planner, its building and safety division and its superintendent, its community development department and its director, its licenses, weights and measures department and its director, its sanitation department and its director, its housing department and its director, and the city school board[1]. By pretrial memorandum opinion and order, the district court certified plaintiffs as representing six subclasses. After more than nineteen trial days which produced more than 2,600 pages in transcript, the district court found jursidiction through 28 U.S.C. §§ 1331, 1343(3) (1970),

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[1] The district court found that the school district, "an entity entirely separate and distinct from the City of Dearborn," "ha[d] not violated any of the plaintiffs' rights," and dismissed the school board. Plaintiffs have not appealed that dismissal, and consequently the school board is not a party on appeal.

reaffirmed its class action order, found that certain defendants' activities combined to "take" certain plaintiffs' properties without due process,[2] and, choosing to exercise its pendent jurisdiction, found that the City had violated the state relocation assistance for displaced persons act, M.S.A. § 8.215(61) *et seq.*, and the state rehabilitation of blighted areas act, M.S.A. § 5.3501 *et seq.*, as incorporated in a city ordinance. By the same opinion and a later judgment, the district court granted far-reaching relief against certain city officials, the city council, and the city plan commission, and their successors, collectively referred to in the opinion and judgment as "the City." The judgment required, *inter alia*, the City to divest itself of properties it had acquired[3] and to pay those plaintiffs who had sold their properties "the difference between the price paid by the City and the price later determined to be the fair market value of the property at the time of the taking of the property."

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[2] "Although none of the activities of the City standing alone may have constituted a taking of plaintiffs' property, this court finds that the combination of the City's announcement and attendant publicly of the clearance projects, the City's refusal to issue certain repair and building permits coupled with its efforts to discourage repairs, the lack of care of City-owned property, the posting of signs on vacant buildings which invited vandalism, the posting of large signs in th area offering to buy property, the solicitation of sales to the City, the City's lack of initiative to control pollution in the South End, and the gradual acquisition of properties in both areas resulted in the taking of property in these areas for which homeowners are entitled to just compensation." 363 F.Supp. at 1277-1278.

[3] The judgment specifies that improved lots were to be offered for sale at the City's acquisition cost "lowered or raised in proportion to the deterioration or improvement to the property since acquisition . . . [and] may be adjusted upward at the rate of Five (5%) Percent per year since acquisition," vacant lots at $500 per 30-foot-wide lot or "the median price paid by the City for vacant lots in the affected area in the last five (5) years." For each six months the properties remain unsold, the judgment specifies that the price should be reduced twenty percent (20%), unless "at the end of any six (6) month period . . . sold to the highest bidder at public auction."

On this appeal, the district court's finding of jurisdiction is challenged as are its findings of an unconstitutional "taking" and of state law violations, and its remedy. We find it necessary to discuss only the challenge to jurisdiction.

For jurisdictional purposes, there are two classes of defendants, (1) the "City defendants" consisting of the City, its council, its plan commission, its building and safety division, and four of its departments,[4] and (2) the "individual defendants" consisting of the mayor, the the city planner, the building and safety superintendent, and directors of four city departments. Similarly, plaintiffs invoked, and the district court found, two jurisdictional bases, the general federal question jurisdiction statute 28 U.S.C. § 1331, and the civil rights jurisdictional statute 28 U.S.C. § 1343(3).

I. JURISDICTION AS TO THE PARTIES

[1] *Service of Process* Axiomatically, the process requires proper service of process in order to obtain *in personam* jurisdiction over either the "City defendants" or the "individual defendants." See, e.g., *Jaynes* v. *Jaynes*, 496 F.2d 9 (2d Cir. 1974); *Backo* v. *Local 281, United Brotherhood of Carpenters and Joiners*, 438 F.2d 176, 180 (2d Cir. 1970), *cert. denied*, 404 U.S. 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971), *Beecher* v. *Wallace*, 381 F.2d (9th Cir. 1967); *Sukowitz* v. *New York City Employees' Retirement System*, 376 F.Supp. 369, 372 (S.D.N. Y 1974).

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[4] No relief was granted against the building and safety division and the four departments, as such, and they have not appealed. Consequently, except for footnote 8, *infra*, they will not be referred to hereinafter.

Fed.R.Civ.P. 4(d) governs the service of process, providing, in part, that service may be made,

> "(1) Upon an individual . . . by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process . . .
>
> "(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by law of that state for the service of summons or other like process upon any such defendant.
>
> "(7) Upon a defendant of any class referred to in paragraph (1) . . . , it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

Thus, Rules 4(d)(1) and 4(d)(7) govern the service on the "individual defendants," Rule 4(d)(6) the service on the "City defendants."

[2,3] Rather than reflecting service on the "individual defendants" in compliance with either 4(d)(1) or 4(d)(7)

by personal service, "residence" service, agent service, or service in compliance with Michigan law, the marshall's return reflects only that the summons and complaint were served on the secretary to the city clerk and on the city director of election. Though the amended complaint fails to reflect whether the individuals were sued in their official or their individual capacities, even if they were sued in their official capacities, proper service of process would still be necessary to obtain personal jurisdiction over those officials. *Gozdanovic* v. *Civil Serv. Comm'n*, 361 F.Supp 504 (W.D.Pa. 1973); *Bell* v. *Hosse*, 31 F.R.D. 181, 184 (M.D.Tenn. 1962). As in *Hosse*, nothing in the record indicates that either the secretary to the clerk or the director of election was authorized as the individuals' agent for service of process.

[4] The district court also could have acquired jurisdiction over the individual defendants had they voluntarily appeared, but the record, rather than reflecting such a voluntary appearance, reflects that the attorneys for the City, in their answers to plaintiffs' complaint and amended complaint, carefully limited their answer to "defendant City of Dearborn, only"[5]

[5] Even the district court "note[d] that the individual defendants, including the mayor, have never answered the Complaint in this matter and are technically in default. Answers have been filed on behalf of the School Board and the City alone. Nonetheless, the City Attorney for Dearborn has proceeded as though he represented all individual defendants and we will treat them as such even though he has never filed an appearance in this matter." 363 F.Supp. at 1271. *Gay Students Organization* v. *Bonner*, 509 F.2d 652, 656-57 (1st Cir. 1974), though sustaining *in personam* jurisdiction over unserved and untimely served trustees "in their official capacities," is distinguishable in that the unserved and untimely served trustees "had authorized their common attorney to prosecute concurrent litigation on the same matter in the state court and had knowledge of the [federal] suit being brought against them."

The parties have cited us to, and we have found, nothing in the instant record indicating that the appearing attorneys were authorized to appear for the individual defendants.

[5-7] Service of process was, however, sufficient to permit the judgment to run against the City and the city council. Admittedly, no "chief executive officer[s]" of those organizations were served. Fed.R.Civ.P. 4(d)(6). Compare *Mathias* v. *City of Milwaukee Dep't of City Development*, 337 F.Supp. 497, 499 (E.D.Wis. 1974) (service on department commissioner sufficient) with *Mendoza* v. *City of Miami*, 483 F.2d 430 (5th Cir. 1973) (service on wives of chief executive officers insufficient) and *United States Steel Corp.* v. *Multistate Tax Comm'n*, 367 F.Supp 107, 118 (S.D.N.Y.1973) (service on commission tax auditor insufficient). But Fed.R.Civ.P. 4(d)(6) also authorizes a government organization to be served "in the manner prescribed by law of that state . . . upon any such defendant." Mich.Comp.Laws Ann. § 600.1925 (1968), and its corollary court rule, Mich.Gen.Court Rule 105.6 (1973), provides that

> "[s]ervice of process on public, municipal, quasi-municipal, or governmental corporations, unincorporated boards, or public bodies, may be made by leaving a summons and a copy of the complaint with . . .
>
> "(2) the mayor, city clerk, or city attorney, in the case of cities; . . .
>
> "(8) the president, chairman, secretary, manager or clerk, in the case of any other public body organized or existing under the constitution or any law of this state, when by statute no other method of service is specially provided.
>
> "The service of process may be made on any officer having substantially the same duties as those named or described irrespective of their titles. In any case, service may be made by leaving a summons and a copy of the complaint

> with a person in charge of the office of any of the above-described officers upon whom service may be made . . . ."

Service on the clerk's office[6] surely was sufficient service on the City through Mich.Comp.Laws Ann. § 600.1925(2), as supplemented by the provision that "service may be made by leaving a summons . . . with a person in charge of the office of any of the above-described officers upon whom service may be made."[7] Though section 600.1925(2) refers to service "in the case of cities," and though none of the few reported Michigan cases construing section 600.1925 have considered the applicability of 600.1925(2) to city councils or city plan commissions, we consider the service also sufficient on the city council, as such, as the City's legislative body.

[8] Despite federal and Michigan courts' demand for compliance with Fed.R.Civ.P. 4(d)(6) and with Mich.Comp.Laws Ann. § 600.1925, see *Mendoza*, *supra*, *United States Steel*, *supra*, *Brooke* v. *Brooke*, 272 Mich. 627, 262 N.W. 426 (1935), service was arguably sufficient on the city plan commission. Thus, the district court may determine that the plan commission was properly present unless, on remand, it determines that the commission was to its prejudice unaware that it had been named as a party defendant in the litigation.

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[6] The attempted service on the elections director, he being neither "the mayor, city clerk, [n]or city attorney," was ineffectual. See *Brooke* v. *Brooke*, 272 Mich. 627, 262 N.W. 426 (1935).

[7] Even if service on the city were insufficient, the city, by answering without raising the insufficiency of service of process, waived that defense. Fed.R.Civ.P. 12(h)(1).

II. SUBJECT MATTER JURISDICTION

Introduction. In addition to acquiring *in personam* jurisdiction over the parties, federal courts, being courts of limited jurisdiction, must have subject matter jurisdiction.

[9] *Civil Rights jurisdiction over "city defendants".* The district court properly found that the defendant city could not be sued through section 1983, 42 U.S.C. § 1983 (1970), and its jurisdictional statute, 28 U.S.C. § 1343(3). *City of Kenosha* v. *Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Hanna* v. *Drobnick*, 514 F.2d 393 (6th Cir. 1975); *Bosely* v. *City of Euclid*, 496 F.2d 193, 195 (6th Cir. 1974). Nor may the city council or plan commission be sued under section 1983 and through section 1343(3). See, e.g. *Garrett* v. *City of Hamtramck*, 503 F.2d 1236, 1249-50 (6th Cir. 1974) (city "planning commission"); *United Farmworkers of Florida Housing Project, Inc.* v. *City of Delray Beach*, 493 F.2d 799, 801 (5th Cir. 1974) (county area planning board); *Lehman* v. *City of Pittsburg*, 474 F.2d 21 (3rd Cir. 1973) (city civil service commission); *Puckett* v. *Mobile City Comm'n*, 380 F.Supp. 593, 597 (S.D.Ala. 1974) (city commission).[8]

[10] *Federal question jurisdiction over "city defendants."* Though municipalities, their councils and their planning commissions cannot be sued through section 1983,

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[8] Nor could the city building and safety division or the city departments be sued through section 1983. See, e.g., *Monell* v. *Department of Social Serv.*, 394 F.Supp. 853, 855 (S.D.N.Y. 1975) (city department of social services); *Canty* v. *City of Richmond*, 383 F.Supp. 1396, 1400 (E.D.Va. 1974) (city police department); *Mathias* v. *City of Milwaukee Dep't of City Development*, 377 F.Supp. 497 (E.D.Wis. 1974) (city department of city development); *Waltenberg* v. *New York City Dep't of Corrections*, 376 F.Supp. 41, 44 (S.D.N.Y.1974) (city department of corrections); *White* v. *Flemming*, 374 F.Supp. 267, 269 (E.D.Wis. 1974)(city police department).

it is well established that municipalities, councils and commissions may be sued directly for fourteenth amendment violations through the general federal question jurisdictional statute 28 U.S.C. § 1331. *Kenosha, supra*, 412 U.S. at 514, 93 S.Ct. at 2227, 37 L.Ed.2d at 116; *Drobnick, supra*, 514 F.2d at 398; *Bosley, supra*, 496 F2d at 195.

[11] Unlike section 1343(3), section 1331 requires that *each* class member asserting "separate and distinct claims" must satisfy the jurisdictional amount requirement. *Zahn* v. *International Paper Co.*, 414 U.S. 291, 302 n. 11, 94 S.Ct. 505, 512 n. 11, 38 L.Ed.2d 511, 519 n. 11 (1973); *Drobnick, supra*.

[12] Plaintiffs claim that the *Zahn* rule against aggregation, however, applies only to Rule 23(b)(3) classes, as in *Zahn, supra*, 414 U.S. at 301, 94 S.Ct. at 512, 38 L.Ed.2d at 519; rather than to Rule 23(b)(1)(B) and 23(b)(2) classes, as the district court below certified. We construe *Zahn*, however, to prohibit aggregation whenever the class members assert "separate and distinct" claims, or demands, 414 U.S. at 295-302, 94 S.Ct. at 508-512, 38 L.Ed.2d at 516-519, irrespective of whether the district court certified the classes to be 23(b)(1), 23(b)(2), or 23 (b)(3). *See Givens* v. *W.T. Grant Co.*, 457 F.2d 612, 614 n. 4 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 56, 93 S.Ct. 451, 34 L.Ed.2d 266 (1972); *Brandt* v. *Owens-Illinois, Inc.*, 62 F.R.D. 160, 169 (S.D.N.Y. 1974). But see *Garrett* v. *City of Hamtramck*, 394 F.Supp. 1151, 1155 (E.D.Mich. 1975).

[13] Of course, "aggregation" is permissible where class members "united to enforce a single title or right in which they have a common and undivided interest." *Gallagher* v. *Continental Ins. Co.*, 502 F.2d 827, 831 (10th Cir. 1974), quoting *Troy Bank* v. *G.A. Whitehead &*

Company, 222 U.S. 39, 40-41, 32 S.Ct. 9, 10, 56 L.Ed. 81, 82-83 (1911). Accord, *Silva* v. *East Providence Housing Auth.*, 390 F.Supp. 691 (D.R.I. 1975).

Consequently, whether plaintiffs asserted "separate and distinct" claims or "common and undivided interests" becomes all-important. Plaintiffs' amended complaint contains averments of "unlawful taking[s] of their propert[ies]," which are more similar to the averments of damage to individual property interests in *Zahn*, *supra*, pay raises in *National Treasury Employees Union* v. *Nixon*, 160 U.S.App.D.C. 321, 492 F.2d 587, 592 (1974), investment interests in *Beckerman* v. *Sands*, 384 F.Supp. 1296 (S.D.N.Y. 1974), and survivor annuity benefits in *Nixon* v. *Hampton*, 400 F.Supp. 881, 886-87 (E.D.Pa. 1975), than to the "common and undivided interest" in the state treasury in *Gallagher*, *supra*, or in a certain environment in *Molokai Homesteaders Cooperative Ass'n* v. *Morton*, 506 F.2d 572 (9th Cir. 1974).

[14] Plaintiffs' claim of a "right" to continue to live in their "unique," Arab Moslem majority, neighborhood, even if a "common and undivided interest," cannot aid them in meeting the jurisdictional amount required. Such right, clearly "incapable of monetary valuation," cannot support section 1331 jurisdiction. See *Goldsmith* v. *Sutherland*, 426 F.2d 1395, 1397 (6th Cir.), *cert. denied*, 400 U.S. 960, 91 S.Ct. 353, 27 L.Ed.2d 270 (1970); *McGaw* v. *Farrow*, 472 F.2d 952, 954-55 (4th Cir. 1973), *Network Project* v. *Corporation for Public Broadcasting*, 398 F.Supp. 1332, 1340-42 (D.D.C. 1975). But see *Gomez* v. *Wilson*, 477 F.2d 411, 420-421 n. 56 (D.C.Cir. 1973); *Brown* v. *Board of Educ.*, 386 F.Supp. 110 (N.D.Ill. 1974).

[15] Even had plaintiffs alleged in good faith that each plaintiff class member had more than $10,000 in

controversy,[9] the city's answer "denie[d] that any of the plaintiffs are able to satisfy the jurisdictional requirements of 28 U.S.C. § 1331." By denying the jurisdictional amount allegation, the city "put the [plaintiffs] to their proof as to the amount in controversy." *United Farmworkers, supra*, 493 F.2d at 802 n. 4. Accord, *Kenosha, supra*, 412 U.S. at 514, 93 S.Ct. at 2227, 37 L.Ed.2d at 116; *Gomez, supra*, 477 F.2d at 419-421; *Manos* v. *City of Green Bay*, 372 F.Supp. 40, 45 (E.D.Wis. 1974); *Beckerman, supra*, 384 F.Supp. at 1298.

Yet, in finding jurisdiction under secion 1331, the district court apparently overlooked the City's answer, stating that,

> "The only challenge to jurisdiction by the defendants was made by the City in its Answer to the First Amended Complaint in which it said, 'Plaintiffs have failed to show that defendant, or its agents have acted under color of law.' . . . [W]e reject the only objection voiced by the defendants to this court's jurisdiction," 363 F.Supp. at 1270.

Plaintiffs' appellate brief claims that "[t]he district court found that Plaintiffs had made a good faith claim that the matter in controversy exceeded $10,000 for each plaintiff." Plaintiffs' Brief at 18. Plaintiffs' counsel, however, seriously misreads the district court's opinion, which merely recites that

> "plaintiffs have[e] alleged that they have been damaged individually in an amount in excess of $10,000 and that their constitutional rights have been violated." 363 F.Supp. at 1270.

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[9] The actual allegation, however, falls short of alleging that *each* class member had more than $10,000 in controversy. Rather, plaintiffs summarily alleged, "the amount in controversy, exclusive of interest and costs, is greater than Ten Thousand ($10,000.00) Dollars" See *Beckerman* v. *Sands*, 394 F.Supp. 1296, 1299 (S.D.N.Y. 1974).

The district court merely, and probably incorrectly,[10] found that plaintiffs had alleged individual damages in excess of $10,000; the district court did not find that plaintiffs had "made good faith claims" in excess of $10,000 for each plaintiff. Had the district court found that more than $10,000 was "in controversy" between each plaintiff, or even certain plaintiffs, and the City, and had substantial evidence supported the finding, then the district court would have had jurisdiction over those plaintiffs' claims. But a conclusionary finding that plaintiffs each had more than $10,000 "in controversy' would have been insufficient since defendants denied the jurisdictional allegation and the record indicates that at least some plaintiff class members had less than $10,000 in controversy with the City. We follow *Patrician Towers Owners, Inc.* v. *Fairchild*, 513 F.2d 216, 219 (4th Cir. 1975), in remanding "in order that the District Court may make specific and detailed findings of jurisdiction . . . , with the right on the part of any of the parties to offer any additional testimony deemed relevant by the trial court . . . ." 513 F.2d at 221-22.

The judgment of the district court is reversed and the cause remanded for further proceedings consistent herewith.

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[10] See footnote 9, *supra*.

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(December 26, 1979)

(Katherine Amen, et al., Plaintiffs, v. City of Dearborn, et al., Defendants — Civil No. 37242)

This is a class action suit in which plaintiffs alleged, and this Court found, that the City of Dearborn and certain of its officers violated plaintiffs' due process rights in connection with the city's attempts to acquire property owned by plaintiffs and clear it for industrial use. The decision for plaintiffs was appealed and the Court of Appeals remanded on jurisdictional grounds. This matter is presently before the Court on plaintiffs' motion to make a finding that the Court has jurisdiction over the city of Dearborn under 28 USC § 1343(3).

The complaint in this case, which was filed in 1971, alleged that the defendants engaged in a course of conduct which destroyed the neighborhoods where plaintiffs lived and resulted in the taking of their property without paying adequate compensation, thereby denying them due process and equal protection and giving them a cause of action under 18 USC § 1983. The plaintiff class consisted of past and present homeowners and tenants of the South End and Eugene-Porath areas of the City of Dearborn, and several neighborhood associations. The complaint named as defendants the Dearborn School Board, the City of Dearborn, its mayor and the city council, several of its administrative departments and several Dearborn city officers. Jurisdiction was based on 28 USC sections 1331 and 1343(3).

After an extended trial, the Court issued detailed findings of fact and law. *Amen* v. *City of Dearborn*, 363 F. Supp. 1267 (E.D. Mich. 1973). Relying on *City Kenosha* v. *Bruno*, 412 U.S. 507 (1973). The Court held that the city itself could not be sued under 42 USC § 1983, and thus that 28 USC § 1343(3), the jurisdictional counterpart of section 1983, did not provide the Court with jurisdiction over the City. However, the Court held that it had jurisdiction over the city under 28 USC § 1331.

The Court found that the City intended to acquire and clear a portion of the South End area and all of the Eugene-Porath area and to rezone these areas for commercial use. The Court's opinion detailed a variety of practices engaged in by the City which pressured landowners to sell their property to the City and depressed land values in these areas, thus decreasing the amount the City had to pay to acquire property. The Court held that:

> Although none of the activities of the City standing alone may have constituted a taking of plaintiffs' property, this court finds that the combination of the City's announcement and attendant publicity of the clearance projects, the City's refusal to issue certain repair and building permits coupled with its efforts to discourage repairs, the lack of care of City-owned property, the posting of signs on vacant buildings which invited vandalism, the posting of large signs in the area offering to buy property, the solicitation of sales to the City, the City's lack of initiative to control pollution in the South End, and the gradual acquisition of properties in both areas resulted in the taking of property in these areas for which homeowners are entitled to just compensation.

363 F. Supp. 1277-78. The Court also held that there was no public purpose for several of the clearance projects the City used to acquire land in these two areas, and that the city did not afford those whose property it took a hearing to determine the value of the property. The Court concluded that "the City through certain [of its officers] has violated plaintiffs' right to due process under the Fourteenth and Fifth Amendments." 363 F. Supp. at 1283.

Exercising its pendent jurisdiction, the Court also found that the City violated the Michigan Relocation Assistance for Displaced Persons Act, M.C.L.A. § 213.321 et seq., and the Michigan Blighted Areas Act, M.C.L.A. § 125.71 et seq. The Court found that plaintiffs' equal protection rights had not been violated and that the defendant School Board had violated none of plaintiffs' constitutional rights.

On appeal, the Court of Appeals held that this Court did not have personal jurisdiction over the individual defendants, that is, the mayor, city planner, building and safety superintendent, and other administrative officers of the city of Dearborn. *Amen* v. *City of Dearborn*, 532 F.2d 554, 557 (6th Cir. 1976). As to subject matter jurisdiction, although plaintiffs did not appeal this Court's finding that the City could not be sued under section 1983, the Court of Appeals did comment that "[t]he district court properly found that the defendant could not be sued through section 1983, 42 USC § 1983 (1970), and its jurisdictional statute, 28 USC § 1343." 532 F.2d at 558. The Court of Appeals held that in order to establish federal question jurisdiction under 28 USC §1331 over the suit as a class action, plaintiffs had to demonstrate that each of the class members could satisfy the $10,000 jurisdictional amount requirement. Thus, the

court remanded " 'in order that the District Court may make specific and detailed findings of jurisdiction . . . , with the right on the part of any of the parties to offer any additional testimony deemed relevant by the trial court . . . .' " 532 F.2d at 560, *quoting Patrician Towers Owners, Inc.* v. *Fairchild*, 513 F.2d 216, 222 (4th Cir. 1975).

In their motion plaintiffs argue that the Court may now assert jurisdiction over the City of Dearborn under 28 USC § 1343(3) because under the Supreme Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), they can now maintain a section 1983 action against the city. The plaintiffs originally moved the Court to find jurisdiction under both section 1343(3) an 28 USC § 1331, but Court requested the parties to first brief and argue the issues regarding jurisdiction under 1343(3) and the application of *Monell*. *Monell* overturned *Monroe* v. *Pape*, 365 U.S. 167 (1961) and *City of Kenosha*, *supra*, and held that local governmental entities are "persons" within the meaning of section 1983 and thus can be sued under this section for deprivations of civil rights where the allegedly unconstitutional action implements official policy or custom. If section 1343(3) is now available to plaintiff as a basis for jurisdiction over the city, each member of the plaintiff class would not have to meet the $10,000 jurisdictional minimum in section 1331 since section 1343(3) does not require that any minimum monetary amount be in controversy.

However, before the Court can consider whether plaintiffs' 1983 action against the city can now be revived and jurisdiction obtained under section 1343(3), it must decide whether it can properly address this issue on the

merits since to do so would go beyond the specific mandate of the Court of Appeals directing this Court to make findings with regard to whether the $10,000 jurisdictional amount of section 1331 is satisfied as to each plaintiff. The general rule is that a lower court "has no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v. *Pennsylvania Railroad Co.*, 334 U.S. 304 (1948); *accord, Tapco Products Co.* v. *Van Mark*, 466 F.2d 109 (6th Cir. 1972). Thus if an appellate court remands a case for a specific purpose, to conduct any proceedings inconsistent with this specific purpose is error. *Mefford* v. *Gardner*, 383 F.2d 748, 758 (6th Cir. 1967).

Some courts have stated that there is an exception to this general rule where there is a change in the law brought about by a statutory enactment or the decision of a more authoritative court subsequent to the appellate court issuing its mandate. In *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), for example, the court remarked, referring mostly to state court decisions:

> [C]ourts in applying the law of the case rule have held that a lower court is not bound to follow the mandate of an appellate court if the mandate is, in the interim, affected by an authority superior to the court issuing the mandate. . . .

383 F.2d at 178. *Farr* was relied upon in *Crane Co.* v. *American Standard Inc.*, 439 F. Supp. 945 (S.D.N.Y. 1977), where the court held that it was not required to follow the mandate the Court of Appeals had issued in remanding the case to it because of an intervening decision by United States Supreme Court changing the relevant law, and proceeded to apply the new Supreme Court case. On appeal of this decision, the Court of Appeals made clear that it disapproved the District

Court's action in applying the new rule, referring to its previous decision in the same case, *Crane Co.* v. *American Standard Inc.*, 490 F.2d 332 (2d Cir. 1973), where it stated:

> [I]t is fundamental that a district court must carry out the mandate of a court of appeals, even if the mandate was in error . . . . The remedy of the aggrieved party is to seek a modification of the mandate . . . .

490 F.2d at 341, *cited at* 603 F.2d 244, 248 n.8.

The Court is of the opinion that this passage correctly states the majority rule: a district court cannot deviate from a mandate issued it by an appellate court even to take into account an intervening change in the law and the mandate must first be amended by the appellate court in order for the trial court to depart from the mandate as originally issued. This rule is reflected in the Supreme Court's holding in *John Simmons Co.* v. *Grier Brother Co.*, 258 U.S. 82 (1921). In *Simmons*, after the trial court entered an order in accordance with a mandate directed to it by the Court of Appeals, the Supreme Court issued a decision directly contrary to the Court of Appeals' position. The Court stated:

> As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal.

258 U.S. at 91. Similarly, in *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F.2d 896, 897 (2d Cir. 1924), the court stated that the District Court correctly obeyed the mandate the Court of Appeals had isued on a previous appeal and declined to apply a Supreme Court decision

which was issued subsequent to the prior Court of Appeals' decision. Professor Moore states that:

> If the appellate court's mandate leaves nothing further to be done by the inferior court, the new and supervening rule should be appropriately called to the appellate court's attention so that it can grant the proper relief, which may necessitate a remand for consideration of the new intervening rule . . . . And although the appellate court's mandate is such that further proceedings are necessary in the inferior court, careful practice dictates that application be made to the appellate court for leave to the inferior court to apply the supervening rule . . . .

IB Moore's Federal Practice 10.404, at 576 n.28 (2d ed. 1974).

To consider the applicability of *Monell* and the propriety of jurisdiction under section 1343(3) the Court would have to address many complex issues far beyond the scope of the Court of Appeals' mandate, such as whether *Monell* is retroactive, whether plaintiffs can now reinstate their 1983 action after not appealing its dismissal, and whether the City is entitled to some type of good faith immunity. In the interest of judicial economy and respect for the mandate of the Court of Appeals, the Court declines to consider these issues when it appears that it does not have the authority to do so.

Defendant City of Dearborn has suggested in it brief that this action is moot with regard to the plaintiff's claim for injunctive relief and that thus this part of the action should be dismissed. In support, defendant details many public improvement projects that it has undertaken in the South End and Eugene-Porath areas.

The Court will not dismiss the claim for injunctive relief, for several reasons.

First, defendant has not made a motion to dismiss, but rather has merely raised this issue in it brief in response to plaintiffs' motion. Second, defendant bases its claim of mootness only on the unsupported, self-serving allegations contained in its brief. Third, even accepting these allegations as true, they pertain in large part to programs that are in the planning stage or just getting under way, and defendant does not detail their present effectiveness. Finally, defendant does not demonstrate that any of these programs have had any impact at all on the specific problems the Court's decree was directed at alleviating. The Court thus finds it unnecessary to decide whether the cases cited by defendant establish that the Court may dismiss a claim for injunctive relief at this stage of the litigation.

For the reasons stated above, plaintiffs' motion to make specific findings of jurisdiction is denied insofar as it relates to 28 USC § 1343(3). An appropriate order shall be submitted.

s/ Ralph M. Freeman
United States District Judge

Dated: December 26, 1979

ORDER DENYING MOTION TO MAKE SPECIFIC FINDINGS OF JURISDICTION

(United States District Court
Eastern District of Michigan
Southern Division)

(February 1, 1980)

(Katherine Amen, et el., Plaintiffs, v City of Dearborn, a Michigan Municipal Corporation, et al. Defendants — Civil Action No. 37242)

At a session of said court held in the Federal Building, Detroit, Michigan, on the 17th day of December, 1979.

Present: Honorable Ralph M. Freeman
United States District Judge

Plaintiffs' Motion for Order on Remand for Findings of Jurisdiction having come in for hearing before the Court on the 17th day of December, 1979, and having been fully presented with briefs and oral arguments by the parties,

Now, Therefore, It Is Hereby Ordered that the Motion for Order on Remand for Findings of Jurisdiction be and hereby is denied on the grounds and for the reason that:

1. The Sixth Circuit Court of Appeals decided and filed an opinion on March 24, 1976 in the above captioned action remanding said action for the limited purpose of findings pursuant to 28 USC §1331 jurisdiction.

2. Plaintiffs' Motion to make specific findings of jurisdiction insofar as it relates to 28 USC § 1343(3) requests that this Court deviate from the mandate issued by the Court of Appeals.

3. This Court has no authority to consider issues which deviate from the mandate without prior modification of said mandate by the Court of Appeals.

Ralph M. Freeman
United States District Judge

Approved as to form and substance:

/s/ William C. Hultgren
Attorney for Defendants

/s/ Michael J. Barnhart

/s/ Thomas C. Carney
Attorneys for Plaintiffs

ORDER

(United States Court of Appeals — Sixth Circuit)

(Filed March 21, 1980)

(Katherine Amen, et al., Plaintiffs-Appellees, v. City of Dearborn, a municipal corporation, et al, Defendants-Appellants — No. 74-1650)

Upon consideration of the plaintiffs' motion to amend the mandate issued May 20, 1976, and further considering the defendants' response thereto,

And it appearing that this Court is without jurisdiction to amend the mandate at this late date,

It is Ordered that the motion be and it hereby is denied.

Entered by Order of the Court
/s/ John P. Hehman, Clerk

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(July 6, 1981)

(Katherine Amen, et a., Plaintiffs, v. City of Dearborn, Defendant — Civil No. 37342)

This is a class action suit in which plaintiffs alleged, and this Court found, that the City of Dearborn and certain of it officers violated plaintiffs' due process rights in connection with the city's attempts to acquire property owned by plaintiffs and clear it for industrial use. The decision for plaintiffs was appealed and the Court of Appeals remanded on jurisdictional grounds. This matter is presently before the Court on plaintiffs' motion to establish jurisdiction under 28 USC §1331, as amended by the Federal Question Jurisdictional Amendment Act of 1980.

The complaint in this case was filed in 1971. The plaintiff class consisted of past and present homeowners and tenants of the South End and Eugene-Porath areas of Dearborn. Two neighborhood associations were also named as plaintiffs. The defendants were the Dearborn School Board, the City of Dearborn, its mayor and city council, several of its administrative departments and several of its administrative departments (sic) and several Dearborn city officers. Jurisdiction was predicated on 28 USC sections 1331 and 1343(3).

After an extended trial, the Court issued detailed findings of fact and law, reported at 363 F. Supp. 1267 (E.D. Mich. 1973). Relying on *City of Kenosha* v. *Bruno*,

412 U.S. 507 (1973), the Court held that the city itself could not be sued under 42 USC § 1983, and thus that 28 USC §1343(3), the jurisdictional counterpart of section 1983, did not provide jurisdiction over the City. However, the Court held that it had jurisdiction over the City under 28 USC § 1331. As to the substantive allegation of the complaint, the Court found that the defendants had engaged in a course of conduct which destroyed the neighborhoods where plaintiffs lived and resulted in the taking of their property without paying adequate compensation, thereby denying them due process.

On appeal, the Court of Appeals found that this Court did not have personal jurisdiction over the individual defendants, that is, the mayor, city planner, building and safety superintendent, and other administrative officers of the city of Dearborn. *Amen* v. *City of Dearborn*, 532 F.2d 554, 557 (6th Cir. 1976). As to subject matter jurisdiction over the City, the court held that under *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), the claims of individual class members could not be aggregated to satisfy the $10,000 jurisdictional amount required by section 1331 and thus that each individual class member had to have $10,000 or more "in controversy" in order for justification to exist over his claim. Accordingly, the court remanded " 'in order that the District Court may make specific and detailed findings of jurisdictin . . . . with the right on the part of any of the parties to offer any additional testimony deemed relevant by the trial court . . . .' " 532 F.2d at 560, quoting *Patrician Towers Owners, Inc.* v. *Fairchild*, 513 F.2d 216, 222 (4th Cir. 1975). The court did not review the substantive aspects of this Court's decision.

No further action was taken on the case until 1979, when plaintiffs moved the court to make findings of jurisdiction under 28 USC §§ 1343(3) and 1331. The Court first considered whether it could make a finding of jurisdiction under section 1343(3) and held the issue of section 1331 jurisdiction in abeyance, since if jurisdiction was found to exist under § 1343(3), hearings to determine whether individual plaintiffs could satisfy th $10,000 jurisdictional amount then required by section 1331 would have been unnecessary. Plaintiffs contended that the Court could assert section 1343(3) jurisdiction over the City under the Supreme Court's decision in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), overturning *City of Kenosha*, *supra*, and *Monroe* v. *Pape*, 365 U.S. 167 (1961).

In an opinion dated December 26, 1979, the Court rejected plaintiffs' bid to establish section 1343(3) jurisdiction, holding that because of the so-called mandate rule the Court could not consider whether section 1343(3) jurisdiction existed. To do so, the Court found, would be to act beyond the terms of the Sixth Circuit's mandate on the remand. The Court summarized the mandate rule as follows:

> [A] district court cannot deviate from a mandate issued it by an appellate court even to take into account an intervening change in the law and the mandate must first be amended by the appellate court in order for the trial court to depart from the mandate as originally issued.

Plaintiffs petitioned the Court of Appeals to amend its mandate but this petition was denied.

In an opinion dated September 24, 1980, this Court discussed the standards and procedures that would be

applied in determining whether individual members of the plaintiff class met the $10,000 jurisdictional minimum. The Court and the parties were preparing a notice to send to class members informing them of the need to come forward with proof that they satisfied the jurisdictional amount when, on December 1, 1980, the Federal Question Jurisdictional Amendments Act of 1980 (hereinafter "the Act"), Pub. L. No. 96-486, 94 Stat. 2369, was signed into law. The Act amended 28 USC § 1331 by eliminating the $10,000 jurisdictional minimum for "civil actions arising under the Constitution, laws or treaties of the United States." In the motion presently under consideration, plaintiffs ask the Court to find jurisdiction under section 1331 as amended by the Act, and thus avoid the necessity of class members having to prove they have at least $10,000 "in controversy" in order to remain in this suit.

Section 4 of the Act states:

> This act shall apply to any civil action pending on the date of enactment of this Act.

In *Eikenberry* v. *Callahan*, Civ. No. 79-2915 (D.C. Ct. App., April 30, 1981), the court indicated that "pending" in section 4 is to be given its ordinary meaning. Courts have uniformly defined pending actions as those still open to modification, appeal or rehearing, that is, those actions in which no final judgment has been rendered. *See, e.g., Ex Parte Craig*, 274 F. 177 (2d Cir. 1921); *United States* v. *Claus*, 5 F.R.D. 278 (E.D. N.Y. 1946). Under this definition, the instant case is clearly a "pending" action. No final judgment has ever been rendered; indeed, as pointed out above, this Court's finding of liability in plaintiffs' favor has never even been reviewed by the Court of Appeals.

The legislative history of the Act also supports plaintiff's contention that Congress intended it to apply to actions such as the instant one. House Report No. 96-1461, *reprinted in* (1981) U.S. Code Cong. & Ad. News, 9123, stated as follows:

> Section 4 provides that this bill shall apply to any civil action pending in Federal court on the date of enactment. By putting congressional intent into immediate effect, this provision will eliminate ongoing jurisdictional battles, thus saving valuable court time.

The instant case is indisputably bogged down in an "ongoing jurisdictional battle" and eliminating this jurisdictional bottleneck will avoid the tremendous expenditure of time and money that would result if each member of the plaintiff class were required to demonstrate that he satisfy the $10,000 requirement, and will facilitate the speedy resolution of this case.

The City bases its opposition to the motion on two grounds. First, it contends that the Court is precluded by the mandate rule, discussed above, from considering the applicability of section 1331 as amended to this case. For the Court to do so, the City asserts, would be to act beyond the terms of the Sixth Circuit's mandate.

In a sense, to apply section 1331 as amended to the instant action would be completely consistent with the Sixth Circuit's mandate. The Court of Appeals remanded the case specifically so that this Court could make findings regarding whether jurisdiction existed under section 1331 and this is the issue to which plaintiff's motion is directed. It is true, of course, that the Sixth Circuit envisioned that this Court would make findings of jurisdiction based on whether individual plaintiffs

had $10,000 in controversy, since that is what section 1331 required at that time for federal question jurisdiction to exist. But even interpreting the mandate as requiring strictly that the Court ascertain whether each class member satisfies the $10,000 amount in the Court's opinion the mandate rule still does not preclude it from applying section 1331 as amended.

As discussed above, Congress intended through section 4 of the Act to apply the amendment to cases such as the instant one. None of the cases cited by the Court to support its holding in its December 26, 1979 opinion involved a Congressional directive that a particular change of law apply to all pending cases. The Court is of the opinion that to apply the judicially created mandate rule so as to frustrate Congressional intent would be to violate its own duties under Article III of the Constitution.

The City also argues that the Court is precluded from applying the amendment to section 1331 to this case by the law of the case doctrine. This doctrine states simply that once a court has decided an issue a particular way, it will adhere to its decision on this issue in subsequent proceeding in the same case. *See* 1B Moore's Federal Practice ¶ 0.404[1] et seq. (2d ed. 1980).

Initially, the Court notes that this doctrine is not an "inexorable rule" but rather is addressed to the court's good sense. *See Cochran* v. *M & M Transportation Co.*, 110 F.2d 519 (1st Cir. 1940); *Luminous Unit Co.* v. *Freeman-Sweet Co.*, 3 F.2d 577 (2d Cir. 1924); *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F.2d 896 (2d Cir. 1924). As with the mandate rule, the Court is of the opinion that the judicially created law of the case doctrine should not be applied so as to preclude the Court from the following express directive of Congress.

Moreover, as the City admits, one exception to the law of the case doctrine is that "so long as the case is *sub judice* a federal court must apply a new and supervening rule of . . . federal law to the decision of federal issues . . . ." Moore's, supra, ¶ 0.404[10] at 575. The City argues, however, that plaintiffs cannot avail themselves of this exception because they failed to appeal either the Sixth Circuit's decision remanding this case or this Court's September 24, 1980 opinion discussing the standards it would apply in deciding whether individual plaintiffs satisfied the $10,000 amount in controversy and, therefore, have lost the right to raise the issue of whether th $10,000 minimum applies.

As to the failure to appeal the Sixth Circuit's decision, it would be senseless to fault plaintiffs for not anticipating a statutory change occurring four years after the court's decision. Furthermore, the issue plaintiffs raise in their motion, the existence of jurisdiction under section 1331, is the very one the Court of Appeals directed this Court to consider so this question is certainly still *sub judice*. And since this Court's September 24, 1980 opinion was interlocutory in nature the failure to appeal it is of no consequence. *See* Moore's *supra*, ¶ 0.404 [9].

For the reasons stated in this opinion the Court grants plaintiffs' motion and finds that it has jurisdiction over the plaintiff's claims against the City under 28 USC § 1331 as amended by the Federal Question Jurisdictional Amendments Act of 1980.

/s/ Ralph M. Freeman
Unite States District Judge

Dated: July 6, 1981

ORDER REINSTATING JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(January 6, 1982)

(Katherine Amen, et al., Plaintiffs, v. City of Dearborn, et al., Defendants — Civil No. 37242)

At a session of said Court held in the Federal Building in Detroit, Michigan this 6th day of January, 1982.

Present: Honorable Ralph M. Freeman
United States District Judge

This matter having come on for trial and the Court having entered a judgment against the defendants on December 11, 1973, and upon appeal from said judgment, the Court of Appeals on March 24, 1976, having reversed and remanded the action to this Court for further jurisdictional findings and this Court having determined that the Federal Question Jurisdictional Amendments Act of 1980 rendered such jurisdictional findings unnecessary for the reasons set forth in a memorandum opinion issued July 6, 1981, and an order having been heretofore entered on November 25, 1981 establishing jurisdiction,

It Is Therefore Ordered, Adjudged and Decreed that the judgment of this Court entered in said cause on December 11, 1973, a copy of which is hereto attached and incorporated herein by reference thereto, is hereby Reinstated.

/s/ Ralph M. Freeman
United States District Judge